

**Attachment 1**

May 27, 2016 Summary Judgment Oral Argument Transcript

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, CIVIL PART  
CAMDEN COUNTY, NEW JERSEY  
DOCKET NO: L-3675-14  
A.D. NO.: \_\_\_\_\_

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MITCHELL WILLIAMS, )  
 )  
 Plaintiff, ) ) TRANSCRIPT  
 )  
 vs. ) ) OF  
 )  
 THE MLB NETWORK, INC., ) )  
 ET AL., ) ) MOTION  
 )  
 Defendant. )  
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Place: Camden County Hall of Justice  
101 South Fifth Street  
Camden, New Jersey 08103-4001

Date: May 27, 2016

**BEFORE:**

THE HONORABLE KASSEL, J.S.C.

**TRANSCRIPT ORDERED BY:**

JAIME VASSALIO  
(LexisNexis CourtLink)

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May 26, 2016

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1 THE COURT: All right. The latest  
2 installment of Williams of Williams versus MLB Network,  
3 L-3674-14.

4 Appearances, please.

5 MS. MATTIACCI: Good afternoon, Your Honor;  
6 Console Law Offices for the plaintiff, Mitchell  
7 Williams.

8 MR. MUNSHI: Good afternoon, Rahul Munshi, on  
9 behalf of the plaintiff, Mitchell Williams.

10 MR. HUGHES: Peter Hughes; Ogletree Deakins,  
11 for defendant, MLB Network.

12 MR. WARDEN: Ryan Warden, Ogletree Deakins,  
13 defendant, MLB Network.

14 MR. BOWMAN: Good afternoon, Your Honor, Chad  
15 Bowman, for defendant Gawker Media, LLC.

16 MR. KELLEY: Tom Kelley, Your Honor, for  
17 Gawker Media, LLC.

18 MS. BERNSTEIN: Elizabeth Seidlin-Bernstein  
19 also for Gawker Media.

20 THE COURT: Very good. I'm not sure which  
21 order the motions came in, but of the two motions, the  
22 one motion by the plaintiff in regard to the contract  
23 claims and the motion by Gawker in regard to the  
24 defamation causes of action, the one that looks a bit

1 cleaner to some extent are the contract claims.

2 So unless somebody has a reason in doing it  
3 in the reverse order, let's do that first. Who is  
4 going to be arguing on behalf of the plaintiff?

5 MS. MATTIACCI: I am, Your Honor.

6 THE COURT: All right. Just one second. All  
7 right. All right. Very good. You may proceed.

8 MS. MATTIACCI: Thank you, Your Honor. We  
9 bring this motion because the deposition testimony of  
10 Mr. Catidi who is the CEO or was the CEO at the time of  
11 MLB Network and the admitted decision maker in this  
12 case, testified clearly as to the reason why he  
13 terminated the contract, stopped paying Mr. Williams.

14 At his deposition, he testified the question  
15 was:

16 "QUESTION: Do you agree that the receipt of  
17 this letter caused you to make the decision to no  
18 longer pay Mitch Williams?"

19 The letter being the letter that he received  
20 from our office in response to the amendment that was  
21 given to him. Mr. Catidi's answer was clear, yes, it  
22 was the receipt of the letter that caused him to stop  
23 paying Mr. Williams.

24 There is no dispute that the only paragraph  
25 that MLB Network is bringing into - is citing to in

1 order to say that they could terminate Mr. Williams  
2 under this contract is 15.03 Section 2, Section 2 only.  
3 They say he was not terminated under Section 1 or  
4 Section 3. Section 2 states that the artist should  
5 prior to -- if the artist should prior to or during the  
6 term hereof commits any act or omits any act of any  
7 action which brings the artist into non-trivial public  
8 disrepute, scandal, contempt or ridicule or what  
9 shocks, insults or offends a substantial portion or a  
10 group of community or reflects unfavorably in a non-  
11 trivial manner on any of the parties.

12 And there is -- as a matter of law, there is  
13 no way that receiving the letter or Mr. Williams having  
14 the letter sent by his attorney to MLB Network would  
15 violate 15.03, Section 2 of the contract.

16 THE COURT: Right. It's a bit of a stretch  
17 to argue that that's the reason. It takes the letter  
18 out of context. The whole case of MLB Network has been  
19 based upon their morals clause of what happened here  
20 and we touched on this in some previous oral arguments  
21 is that given the benefit of all favorable inferences  
22 to MLB Network as a summary judgment motion requires,  
23 the inference is is that they believe they have a basis  
24 for terminating the contract when they hear about these  
25 allegations and Mr. Williams' behavior but made an

1 effort to salvage the relationship they offer him a  
2 basis for remaining employed, not going to Little  
3 League type of games, going for anger management, that  
4 type of stuff. There was some back and forth and  
5 eventually that letter comes in where there -- MLB's  
6 requested amendment to the contract is not accepted.

7 So the letter is sent to MLB and that  
8 apparently was the straw that broke the camel's back  
9 from their perspective, but that was only the straw, it  
10 wasn't the entire back of the camel. It was everything  
11 combined. At least their entitled to that inference.  
12 You can make that argument before a jury but the  
13 inference that they're entitled to is that it was the  
14 amalgamation of events including the refusal to sign  
15 the amendment that caused them to regard the morals  
16 clause to be in violation.

17 MS. MATTIACCI: Well, I think that inference  
18 is a huge stretch because this is the decision-maker.  
19 He is the CEO. He could have testified as they wanted  
20 him to testify and say oh, no, it wasn't the receipt of  
21 the letter that caused it, but that's what he said.  
22 That's his testimony.

23 THE COURT: I understand that, but you can't  
24 interpret snippets of colloquies in depositions taken  
25 out of context. The reason why there was the back and

1 forth in regard to the proposed amendment was it as  
2 based upon what the news media had reported had  
3 occurred in Gawker have MLB concerned that there may be  
4 a violation of a morals clause.

5 MS. MATTIACCI: Well okay. So let me go to  
6 the second argument then, Your Honor, because --

7 THE COURT: I'm trying -- I'm trying -- where  
8 did all of this -- I want to get the moral clause out  
9 because the second --

10 MS. MATTIACCI: Yes.

11 THE COURT: -- argument actually presented  
12 more interesting a more interesting topic and I'm just  
13 trying to --

14 MS. MATTIACCI: If you have the -- I can give  
15 you a copy of the contract, Your Honor, it's page 11 if  
16 you don't have it. If you do --

17 THE COURT: What exhibit in --

18 MS. MATTIACCI: It is Exhibit A to plaintiff's  
19 motion for summary judgment.

20 THE COURT: All right. All right. Very  
21 good.

22 MS. MATTIACCI: And page 11 at the bottom is  
23 the morals clause.

24 THE COURT: All right. I'm there.

25 MS. MATTIACCI: Okay. So the second argument,

1 Your Honor, is that the decision maker, the CEO of MLB  
2 Network testified that he must conclude that the  
3 alleged conduct is true in order to trigger the morals  
4 clause. He testified to that on page 111 of his  
5 deposition.

6 The question was clear:

7 "QUESTION: Do you agree with me then that it  
8 would in order for you to trigger Section 1503, you  
9 must conclude that the alleged conduct is true.

10 "ANSWER: Right. The conduct from the entire  
11 weekend, Saturday and Sunday. Yes."

12 And then when asked if he concluded if the  
13 alleged conduct was true he said he wasn't sure, he  
14 didn't know if it was true or not.

15 THE COURT: Well, how would he know? He  
16 wasn't there. Let me give you an easier example. O.J.  
17 Simpson told some time in 1992 was a pitch man for  
18 certain products as I recall.

19 These morals clauses, my guess is appeared in  
20 virtually every contract involving a celebrity and a  
21 product or something where they want the goodwill of  
22 the celebrity as part of the advertisement pitch.  
23 That's why celebrities are hired, rather than you or  
24 me.

25 So these morals clauses are ubiquitous. Now,

1 I don't know for sure whether or not O.J. Simpson did  
2 what he was alleged in the criminal trial to do. He  
3 was acquitted in the criminal trial. In the civil  
4 trial, he was found culpable.

5 But nobody -- I don't know what products Mr.  
6 Simpson had back in '90 -- back in 1992, but presumably  
7 if he was selling -- what was he -- what was his big  
8 account back then?

9 MS. MATTIACCI: I think Hertz.

10 THE COURT: Hertz. Thank you. Suppose  
11 Hertz said, you know what, we weren't there when two  
12 people were murdered, but the American public, a good  
13 part of them thinks that Simpson is guilty. We don't  
14 want him pitching our Hertz products anymore.

15 The interesting question is whether or not A,  
16 somebody at the product has to believe the accusation.  
17 Why does it have to be -- who is this fellow who got  
18 deposed on behalf of the MLB?

19 MS. MATTIACCI: He's the CEO --

20 THE COURT: Oh, the CEO. Okay.

21 MS. MATTIACCI: -- and the decision maker.

22 THE COURT: As opposed to anybody else. But  
23 more importantly, does the person actually have to be  
24 guilty of the underlying offense? You can make the  
25 argument that it's not fair to the celebrity if they're

1 wrongfully accused of something and it just so happens  
2 that the chief executive of the company who may be  
3 looking for a reason to get rid of the celebrity, maybe  
4 the celebrity is not selling as much product as they  
5 had hoped and now somebody makes an accusation, it ends  
6 up in the paper and the CEO can very conveniently site  
7 I agree he killed two people, he beat his wife, he  
8 spray painted a slogan on a wall, he got drunk and spit  
9 in somebody's face. Whatever the accusation may be  
10 from time-to-time, anybody can make an accusation.

11 MS. MATTIACCI: Right.

12 THE COURT: Why should it matter that it  
13 actually is believed or not believed by the employer  
14 because the employer could always say it's kind of  
15 self-serving if they want to get rid of the celebrity,  
16 I believed it.

17 It seems an awkward test to put the ability  
18 to terminate a contract solely on the subject of belief  
19 of somebody who works for the employer.

20 MS. MATTIACCI: It shouldn't be. I believe  
21 that the way the contract is written and the language  
22 of the contract, it had to have happened in order for  
23 him to terminate.

24 THE COURT: well, suppose it happened, but  
25 the employer -- you can have a situation where it

1       happened, 95 percent of the country believes it  
2       happened, but just because the CEO has some doubt then  
3       we don't have a violation of a morals clause?

4       MS. MATTIACCI: No. No, Your Honor. One,  
5       the contract is written -- because a lot of these  
6       contracts say -- specify in -- to the full discretion  
7       of the employer if the employer --

8       THE COURT: Well, let's take it -- let's take  
9       it -- let's see if the language in the morals clause  
10      tells us --

11      MS. MATTIACCI: Right.

12      THE COURT: -- if an artist should prior to  
13      blah, blah, blah, blah --

14      MS. MATTIACCI: Commit.

15      THE COURT: All right.

16      MS. MATTIACCI: Commit the act. It does not  
17      have the terms in there that you sometimes see in these  
18      morals clauses where it says if in the sole discretion  
19      of the employer the employer concludes --

20      THE COURT: Right. He's got to commit the  
21      act. Okay.

22      MS. MATTIACCI: Yeah.

23      THE COURT: Where does it say that the  
24      employer has to believe the allegation that the  
25      celebrity committed the act? Where does it say that?

1       MS. MATTIACCI: No, we are saying that that's  
2       even -- not -- what we are saying that the fact that  
3       the employer didn't even believe that he committed it  
4       how are they going to reach the height of he committed  
5       it? I mean, they don't even believe that he committed  
6       it.

7       THE COURT: I know people that don't believe  
8       that Elvis is dead. I know people that believe in wild  
9       conspiracy theories. Some of them are -- maybe they're  
10      right, I don't know. But the point I'm making is that  
11      whether or not an athlete or a celebrity is in  
12      violation of a contractual morals clause shouldn't  
13      depend upon the subject of belief of some individual  
14      sitting on the 12<sup>th</sup> floor of some office who may not be  
15      privy to all of the investigatory materials.

16      MS. MATTIACCI: Well --

17      THE COURT: Did he read -- did this fellow  
18      who you deposed, did he read every single police  
19      report, every single witness statement, everything that  
20      was generated out of this event?

21      MS. MATTIACCI: Ok

22      THE COURT: And even if he did suppose he  
23      has a bias against Mitch Williams?

24      MS. MATTIACCI: Well, Your Honor, there were  
25      no police reports, there was never an arrest, there was

1 nothing of that nature.  
2

3 THE COURT: But you understand the problem  
4 is is that if we -- if -- and by the way, nobody  
5 started any -- I don't -- the defense didn't start any  
6 case law as far as I can recall as to whether it is an  
7 objective test or a subjective test. An objective test  
8 would be far simpler.

9 We can look at the evidence against the  
10 athlete and determine whether that objectively speaking  
11 the evidence preponderates in favor that he or she did  
12 it or it preponderates in favor of he or she didn't do  
13 it.

14 You can even use a higher standard if you  
15 want, but at least it's subjective. By saying we asked  
16 the head of the company if he believes it, you turned  
17 an objective standard into a subjective standard and if  
18 the executive wants to get rid of the celebrity, he or  
19 she can very easily say I believed it and then bingo,  
20 the celebrity is out their income.

21 MS. MATTIACCI: Well, the motion is based  
22 upon the testimony of the decision maker. He was the  
23 one that was most intimately involved in the situation  
24 and this decision maker said that his understanding of  
25 the contract was that he had to have concluded that it  
occurred in order to fire him.

1 THE COURT: Well, suppose he said -- do  
2 yourself a thought experiment.

3 MS. MATTIACCI: Yes.

4 THE COURT: Suppose he said, you know  
5 something, after I read what happened, I've never seen  
6 a more guilty person than Mitch Williams, I would stake  
7 my life he is guilty. Do you take your lawsuit and  
8 dismiss it?

9 MS. MATTIACCI: No, because I don't think  
10 that even the conduct that was alleged would violate  
11 the morals clause so --

12 THE COURT: Well, but the point is of course  
13 you wouldn't. You wouldn't say that my client's multi-  
14 million dollar contract claim depends upon whether or  
15 not this guy says he believes or doesn't believe the  
16 accusation.

17 Look, I don't know what happened that  
18 particular day. And ultimately we may have to sort it  
19 out, but it seems to me absent case law the fairest way  
20 to approach it is doing he do it or not? What did he  
21 do?

22 Because if he didn't do what's alleged why  
23 should he lose his contract? My point is it shouldn't  
24 depend upon what some fellow at Major League Baseball  
25 thinks did or didn't happen. All right? Look, if the

1 contract said that, if the contract said it shall be a  
2 violation of the morals clause whether the celebrity  
3 did it or not if the company believes he did it.

4 Because remember, who is in the company? The  
5 companies are amorphous things and they only speak to  
6 human beings. Right? So some human being has to  
7 believe or not believe.

8 He didn't even say in the opinion of the CEO  
9 if the celebrity, you know, violated the morals clause,  
10 that's sufficient. But they didn't write it that way.  
11 The only term they use commits any act which to me  
12 connotes that the athlete actually has to have done it  
13 and if he didn't do it, it doesn't matter what anybody  
14 thinks.

15 And the salutary results from that is that  
16 people don't lose their jobs based upon false  
17 allegations because anything can appear in the  
18 newspaper, anything can appear in a magazine, accusing  
19 anybody of anything and it seems to me not lose their  
20 sources of income because somebody makes an allegation  
21 in the paper and I'll tell you with the internet, you  
22 know, in the old days it was a bit more difficult.

23 Today with the internet, a story that may  
24 have been buried 30 years ago because somebody was a  
25 crack pot, now ends up being on Google News, you know,

17

1 the third thing down, all of a sudden everybody is  
2 talking about.

3 It goes viral as -- to use the nomenclature.  
4 So neither side cited a case -- which was rather  
5 surprising because these moral clauses as I say are  
6 ubiquitous. But it seems to me that the issue  
7 concerning whether or not Mr. Williams did what Gawker  
8 alleged he did in their articles as being the basis of  
9 a violation of the morals clause doesn't depend upon  
10 the subjective belief of the CEO of Major League  
11 Baseball Network.

12 It should depend upon whether or not Mr.  
13 Williams actually did what the Gawker alleged that he  
14 did.

15 MS. MATTIACCI: Okay. On that point then,  
16 Your Honor, there is absolutely zero evidence that he  
17 ever ordered a bean ball of a child.

18 THE COURT: We'll deal with that. That's a  
19 separate -- that at best is probably going to be  
20 injurious so we'll deal with that. But that dovetails  
21 more to the defamation causes of action and we'll deal  
22 with that.

23 But remember you're -- your motion was based  
24 upon getting the CEO to say certain things. By the way,  
25 he didn't say he didn't believe it. I think he hedged

1 it a bit. What exactly did he say?  
2

3 MS. MATTIACCI: He said he wasn't sure.  
4

5 THE COURT: Wasn't sure. Which actually may  
6 be honest. I mean, I'm -- look, I'm privy -- I have --  
7 the record should reflect this is what, about ten  
8 pounds worth of stuff? All right? All the witnesses  
9 statements, everything else assuming I actually read  
10 each statement; I sat in my apartment at 11 o'clock  
11 last night until 5 o'clock in the morning, I read every  
12 piece of -- every document, every piece of evidence in  
13 this case they conflict. I don't know what happened,  
14 right? It's like -- it's like anything else in life,  
15 there are a number of different versions and ultimately  
that's what we have juries for. We have juries sort it  
out for better or for worse.

16 The jury might not get it right, who knows  
17 but both sides are entitled to have a jury pass on the  
18 allegation that Mr. Williams misbehaved during that  
19 Little League game.

20 All right. What's your -- what other  
21 arguments do you want to pose in regard to the contract  
22 claim?

23 MS. MATTIACCI: Well, the fact that even  
24 taking the conduct that MLB alleges he engaged in that  
25 violates the morals clause no reasonable jury could

1 conclude that that rises to the level that he violated  
2 the morals clause as it's written.

3 That does not bring Mr. Williams into non-  
4 trivial, non-trivial, meaning significant public  
5 disrepute, scandal, contempt, or ridicule which shocks  
6 or insults or offends a substantial portion or group of  
7 the community or reflects unfavorably in a non-trivial  
8 meaning substantial as confirmed by MLB, that's what he  
9 means substantial in any of the parties.

10 So even if you take that he got into an  
11 argument with the ref --

12 THE COURT: Well, that doesn't -- I don't  
13 think anybody argues that the manager of a team arguing  
14 with the umpire somehow is eight standard deviations  
15 away from the norm. I'm not a -- I wasn't an athlete  
16 when I was young and I didn't participate all that much  
17 but from what I've seen on T.V. the manager is arguing  
18 with the referees and umpires are pretty much standard  
19 for the game.

20 The obvious allegation in this case I think  
21 stands out as being if true particularly reprehensible  
22 is the order to have some 10-year-old throw a baseball  
23 at some other ten-year-old's head. That's what's being  
24 alleged here. And if that's true, that would be meet  
25 the morals clause.

1                   If that gets kicked off, then you're right,  
2 some of the other stuff may be a bit more murky. But  
3 at this point in time it looks like it represents jury  
4 issues until and unless that gets thinned out of a  
5 case.

6                   MS. MATTIACCI: Okay. Thank you, Your Honor.

7                   THE COURT: Anybody from the defense in  
8 regard to the contract issues? Anybody want to --  
9 anybody want to -- only because you know it's -- a lot  
10 of my comments cut both ways.

11                  Anybody aware of a case that suggests how a  
12 morals clause that contains language like this should  
13 be interpreted in terms of -- is it an objective  
14 standard, is it a subjective standard? Anybody have any  
15 authority on that?

16                  MR. HUGHES: The issue -- I'm sorry, Your  
17 Honor, Peter Hughes, the issue wasn't raised in the  
18 motion, so I didn't really look into it for this.

19                  THE COURT: Well, eventually, if the case  
20 goes to the jury the jury is going to be charged and I  
21 assume that one of the issues is does a jury have to  
22 determine that, in fact, the plaintiff did do what was  
23 alleged because if he didn't, it doesn't matter if  
24 everybody at MLB Network believes he did, if he didn't  
25 do it, it's not a violation of the morals clause.

1                   MR. HUGHES: Your Honor, I would say suffice  
2 to say the evidence we could win under either standard.

3                   THE COURT: No, but if that -- if you want  
4 to win and have the win stick, the jury has to be  
5 properly instructed and everybody should know the prism  
6 upon which the case has to be tried and I'm not going  
7 to put you on the spot. You're right, it wasn't -- it's  
8 not a central part of the motion, but to me it's one of  
9 the more interesting things raised generally in the  
10 motion papers is that can somebody who is innocent  
11 of an allegation, but the allegation is well publicized  
12 in the media, thereby destroying the celebrity's good  
13 will.

14                  I'm trying to think of an example, of a more  
15 recent example if somebody was falsely accused of  
16 something, anybody think of anything that comes to  
17 mind?

18                  MS. MATTIACCI: Well, Your Honor, the CEO was  
19 asked that exact question of whether the -- whether he  
20 could be terminated under the morals clause --

21                  THE COURT: Right.

22                  MS. MATTIACCI: -- if it was a defamatory  
23 publication. It said if we were assumed that a  
24 publication like Deadspin writes an article that  
25 defames Mr. Williams, made a false statement. He

1 ordered a kid to throw a bean ball. That's just not  
2 true, but the article catches fire, it gets reported.  
3 People Tweet about it, et cetera, do you believe under  
4 the agreement that you would then be able to terminate  
5 the agreement based on a defamatory publication that is  
6 out there?

7 "ANSWER: No."

8 THE COURT: He's probably right. It seems  
9 intuitively unfair. You may think well it's unfair for  
10 the employer to be stuck with a radioactive employee,  
11 but they could avoid that by redrafting a morals clause  
12 that basically says it doesn't matter if you did it or  
13 not, if people think you did it, in this country or in  
14 this world is just as bad as doing it because once the  
15 allegation is out there it's difficult to put the genie  
16 back into the bottle and we don't want you pitching our  
17 product or, you know, or being the spokesman for our  
18 company if everybody out there thinks that you did it,  
19 even if you didn't do it.

20 But that's not the way this moral -- at least  
21 it's not clear that that's the way that this morals  
22 clause was written.

23 MS. MATTIACCI: Exactly, Your Honor.

24 THE COURT: It probably was taken from a  
25 million other morals clauses that are out there

1 involving Hollywood celebrities and athletes and the  
2 like and but maybe there's case law in California where  
3 you see a bit more of this because of the celebrity  
4 culture out there.

5 MS. MATTIACCI: Right.

6 THE COURT: All right.

7 MS. MATTIACCI: I just had one other issue for  
8 the breach of contract claim and that is that even if  
9 it was determined that he engaged in the conduct  
10 alleged that it was determined that that conduct  
11 violated the morals clause that it was not a material  
12 breach of the contract --

13 THE COURT: Yeah, I saw that. I'll make  
14 short work of that. It's true that there is one part  
15 in the contract that specifies what is a material  
16 breach and there are maximums of contract  
17 interpretation that allow -- for the inference then  
18 well, if the drafters of the contract were very  
19 specific that A is a material breach and they don't say  
20 that B, C, and D are material breaches than ipso facto  
21 they didn't intend B, C, and D to be material breaches.

22 There are maximums of contract interpretation  
23 that allow that but there are also maximums of contract  
24 interpretation that go the opposite direction that one  
25 would not infer that just because there are certain

1 language specify in some parts, that the other parts  
2 that don't contain that language specificity meant to  
3 disinclude it specifically in this particular case it's  
4 hard to imagine the intent of the employer in putting  
5 in a morals clause to have a situation where you have a  
6 very blatant morals clause violation and yet even  
7 though the celebrity no longer has any value in regard  
8 to their name, that the employer still wants to pay  
9 them as though they were out -- they were the person  
10 that was hired before the allegation went out there.

11 That's an awkward way of putting it, but it's  
12 hard to imagine a morals clause violation that by its  
13 definition is not trivial. If it's trivial, it's not a  
14 morals clause violation. If it's a non-trivial morals  
15 clause violation, it's hard to imagine a situation  
16 where one would not say it's material.

17 MS. MATTIACCI: Well, let me just address a  
18 couple of things one, the definition of material  
19 breach. Material goes to the essence of the contract.  
20 The essence of this contract was Mr. Williams being an  
21 analyst, MLB paying him to be an analyst.

22 THE COURT: No. The essence of the contract  
23 was Mr. Williams was Mr. Williams. They're paying  
24 because Mr. Williams is Mr. Williams. They're not  
25 going to pay me to do -- I might know more than -- for

1 all you know, I might know more about baseball than Mr.  
2 Williams. I don't, but you don't know that.

3 MS. MATTIACCI: I know, Your Honor.

4 THE COURT: All right. But I am just some  
5 name, Mr. Williams has a cachet to his name and that  
6 was in part the reason why he's paid. When you pay for  
7 a celebrity and you have a morals clause you're paying  
8 a premium to have the value of the celebrity's name  
9 that even though somebody -- you may find somebody that  
10 spends 24 hours a day studying baseball in their attic  
11 and they might know a huge amount about statistics and  
12 they could quote you somebody's batting average from  
13 1953, but they're not Mr. Williams and there's no added  
14 value in having them discuss baseball.

15 The whole value of having somebody like Mr.  
16 Williams, particularly Mr. Williams, is that he is a --  
17 he is a large -- his name more so than a lot of other  
18 names remains prominent. All right? Even somebody  
19 like me who as I say didn't really follow baseball for  
20 many, many years I had heard of Mr. Williams.

21 If you ask me now to name a single player on  
22 the Phillies, I couldn't do it. All right? I could  
23 name a few players from the past, the guy that hit all  
24 the home runs, Schmidt. Steve Carlton. I'm not going  
25 to embarrass myself in trying to name more, but I could

1 name Mr. Williams. You kind of remember the name out  
2 there.

3 And by hiring him the whole business that  
4 people who otherwise would not pay attention to Major  
5 League Baseball Network will say well, Mitch Williams  
6 is a commentator and that they'll get more of an  
7 audience because what he has to say is going to be more  
8 interesting, more informed than just, you know, a guy  
9 on the street coming on commenting about it.

10 MS. MATTIACCI: Okay. But, Your Honor, with  
11 all due respect, that's not what the language of the  
12 contract says. I mean, you are putting in words to the  
13 contract, we're just going about the four corners of  
14 this contract and what the language says and it does  
15 not say that this is a material breach, it doesn't even  
16 say that this is a breach.

17 It doesn't say that the -- we can stop paying  
18 him if he reaches it.

19 THE COURT: I don't think the draft is I  
20 have a place next to every single clause whether it was  
21 or wasn't a material breach. Your argument would be  
22 strengthened if he did that 95 percent of the time and  
23 just simply omitted any reference to this.

24 But on one occasion they specified that that  
25 is a material breach and in no other occasion do they

1 cite either something is or is not a material breach.

2 So you have the assemblance of an argument,  
3 but at best it's a jury issue.

4 MS. MATTIACCI: Okay. Well, I just -- just  
5 for the record, I know one of the other issues that was  
6 brought up in the motion to dismiss was that there was  
7 this user paragraph that they could still use him and  
8 keep the contract intact in that they could have -- MLB  
9 could have chosen to do that and they didn't but I  
10 think that they're -- I just wanted to make the  
11 distinction there in case that was the other thing  
12 holding you up was there could be -- you could still  
13 terminate the contract under the morals clause not use  
14 him and have to pay him because other terms of the  
15 contract would still exist.

16 THE COURT: Yeah, I remember that kind of  
17 came up in the past --

18 MS. MATTIACCI: Yes.

19 THE COURT: -- and I wasn't particularly --

20 MS. MATTIACCI: It came up because the MLB  
21 would have the ability to just simply not use him.  
22 They could not put him on the air. The contract would  
23 still be intact, but they don't have to pay him.

24 THE COURT: Yeah, but it -- but if that was  
25 the intent using after all, this was a fairly hard

1 paying contract. If the intent was that a violation of  
2 the morals clause would give the employer the option so  
3 to speak of stopping the use of the celebrity, but they  
4 would still have to pay him, the contract would have  
5 been far more specific than that -- that is --  
6 that a morals clause violation would entitle the  
7 employee to at least compensation even though it would  
8 no longer entitle them to air time, that type of thing  
9 and that wasn't specific.

10 MS. MATTIACCI: Well, what it also -- it is  
11 specific is it does give them the ability to terminate  
12 the contract which would mean the other obligations of  
13 MLB would go by the wayside and particularly paragraph  
14 the indemnity clause which they would have to still  
15 indemnify him for all actions during the course of the  
16 contract, if they just didn't put him on the  
17 air under the user clause, they could do that but they  
18 would still be obligated to cover any liability.

19 THE COURT: Yes, but the indemnity  
20 agreements are a completely different beast. It's not  
21 uncommon for employees to say look, you know, I'm might  
22 -- there are a number of things that happened out there  
23 that may result in me being sued, that type of thing.  
24 I want you to protect me.

25 Suppose Mr. Williams says something in a

1 broadcast that somebody else thinks defames them and he  
2 is the recipient of a defamation lawsuit?

3 MS. MATTIACCI: Right.

4 THE COURT: He would want Major League  
5 Baseball to defend him, he wouldn't want to go out  
6 there and hire his own lawyer and pay a huge amount of  
7 money to lawyers to defend him in a defamation lawsuit  
8 that he was a defendant in; particularly if it didn't  
9 result from some private dispute.

10 If it resulted from him saying something on  
11 the air about somebody saying some player was not a  
12 good player or saying that some manager was an idiot or  
13 something like that somebody might file a lawsuit and  
14 the indemnification agreement obviously was intended to  
15 protect Mr. Williams from those types of things and  
16 here is the thing. Even -- I'm not -- it's not before  
17 me, but I'm not sure that even if there's a violation  
18 of the moral's clause if somebody before -- at least  
19 before the morals clause violation alleged that Mr.  
20 Williams did defame them he almost certainly would be  
21 entitled to indemnification.

22 It wouldn't relieve Major League Baseball of  
23 their obligation to provide indemnity. I think it does  
24 prospectively if it there is a morals clause violation  
25 relieve them of their obligation to pay.

1 MS. MATTIACCI: Yes. I mean, it's -- the  
2 point was that the indemnity lasts through the term of  
3 the contract. So the gain for MLB by terminating the  
4 contract under the morals clause as opposed to just not  
5 using him and exercising their right under the user  
6 clause is that they gain the relief for the liability  
7 of Mr. Williams for the term of the contract.

8 So there is a difference. There's a  
9 distinction between simply not using it.

10 THE COURT: There's -- as I say there's a an  
11 assemblage of an argument there but it's difficult for  
12 me to by looking at this contract to think that the  
13 intent was that if there was a morals clause violation,  
14 Major League Baseball Network could stop using the  
15 athlete, but we still have an obligation -- I mean, if  
16 the morals clause obligation occurred on the first day  
17 of the contract, they would have an obligation to pay  
18 him throughout the entirety of the contract and it's  
19 hard to believe that that was their intent.

20 MS. MATTIACCI: Okay. So just so I'm clear,  
21 the jury question then on the breach of contract claim  
22 is going to be whether or not he ordered the bean ball.

23 THE COURT: Yeah, it seems to me in thinking  
24 out loud I hate to have the jury verdict sheet to be 50  
25 pages long, but almost certainly they would need to be

1 a determination as to whether or not the allegations  
2 that form the basis of the morals clause violation, in  
3 fact, occurred and if they did occur and I'm correct  
4 about the posture of the law, it may be that there is  
5 no morals clause violation. Do you want to argue with  
6 that, Mr. Hughes?

7 MR. HUGHES: No, Your Honor. I just want to  
8 make clear it has never been there is no evidence,  
9 there is no testimony, there is no pleading, there is  
10 no brief, there is no anything that ever said that the  
11 contract was terminated solely because of the hit  
12 batter. That is an absolute falsehood and the attempt  
13 of counsel to put that on the record --

14 THE COURT: Well, I'm not sure -- you seem  
15 to be a little bit heated.

16 MR. HUGHES: I am because she just said so  
17 the only issue for jury is whether he ordered a bean  
18 ball.

19 THE COURT: No, I don't think that was -- I  
20 didn't interpret the question to be that. I think it's  
21 one of the more important issues that need to be  
22 resolved and not just the bean ball allegation, there  
23 are other allegations and we're going to have to figure  
24 out how to put it before the jury if it goes that far.

25 But if legally in order to have a morals

1 clause violation it has to be that the -- in this case,  
2 the athlete has to have committed the underlying acts  
3 then the jury has to be very specific about what's been  
4 proven and what's not been proven in regard to the  
5 underlying acts, right? And there might be a dispute  
6 as to whether certain allegations either by themselves  
7 are more complicated in aggregation with the other  
8 allegations is sufficient.

9 But the jury will need to determine what's  
10 been proven and what's not been proven and it may be  
11 that even if -- even assuming this bean ball thing goes  
12 by the wayside, it may be that no one allegation may be  
13 sufficient but when you combine them all, that might be  
14 sufficient.

15 There's also a maximum of interpretation  
16 using a Latin expression to say that, you know, the  
17 singular may not do the trick, but the accumulation  
18 combined and viewed as a whole may be sufficient. But  
19 the trial is not tomorrow. I'm not going to worry  
20 about it now, but I think the central positon is is  
21 that whether or not Mr. Williams actually did anything  
22 that's alleged is something that the jury is going to  
23 have to determine and it's going to have to be  
24 demonstrated in order for the morals clause to be  
25 implicated.

1 Anybody on this side of the table want to  
2 disagree that the morals clause is not violated at the  
3 outset and, in fact, doesn't commit the underlying acts  
4 that form the basis of the triggering of the morals  
5 clause?

6 MR. HUGHES: Your Honor, I would just say I  
7 haven't looked at the specific law so I can't comment  
8 one way or the other.

9 THE COURT: All right. All right. What's  
10 the next issue?

11 MR. HUGHES: I believe the next issue, Your  
12 Honor, is Gawkers Media -- is Gawker's motion for  
13 summary judgment, all claims against it.

14 THE COURT: All right. This is going to be  
15 time consuming. And probably the smartest things to do  
16 is to take what I regard as being the worst allegation,  
17 see what the proof is in regard to that and seeing  
18 whether or not it meets the level of fair and  
19 convincing that the utterer or the publisher of the  
20 defamatory comment, allegedly defamatory comment must  
21 have known of the falsity.

22 Anybody want to disagree with using that  
23 procedure then we'll take the bean ball one first and  
24 we'll go through the entire record item by item to see  
25 what we have, what we don't have. I mean, this stuff

1 as you can see this stuff weighs pounds and pounds of  
2 stuff -- pounds and pounds of evidence and you've each  
3 spent a very -- I commend both sides. You spent an enormous  
4 amount of time reiterating the record but it's not all  
5 crystalized in my brain to the point where I can just  
6 simply rattle them all off.  
7

8 We'll take them item-by-item. Because one of  
9 the allegations in regard to the bean ball is is that  
10 nobody actually, I don't know whether the allegation is  
11 nobody actually said it or that Williams said to pitch  
12 close or something like that.

13 There were sources that were used that have  
14 never been revealed, et cetera, et cetera. Who set up  
15 the movie stand here?

16 MS. MATTIACCI: Chad.  
17 MR. BOWMAN: We did that, Your Honor.  
18 THE COURT: Do you have something you want  
19 to show me on the movies? What do you want to how me?  
20 MR. BOWMAN: Maybe I can do that, Your Honor.  
21 Maybe I can help you with the ten pounds of material  
22 and we'll take the bean ball allegation.  
23 We did a lot of discovery in this case --  
24 THE COURT: Right.  
25 MR. BOWMAN: There were 13 depositions.

1 THE COURT: Let's start with that.  
2 MR. BOWMAN: Okay.  
3 THE COURT: My thought is that it doesn't  
4 matter what discovery reveals, it matters what the  
5 Gawker knew when the stuff was published. Right?  
6 MR. BOWMAN: We agree with that, Your Honor.  
7 THE COURT: All right. So we have to focus  
8 on two separate dates, all right? What did the Gawker  
9 know on day one and what did the Gawker know, what was  
10 it three or four days later something like that?  
11 MR. BOWMAN: The two stories at issue were  
12 made May 11<sup>th</sup> and May 16<sup>th</sup>, yes, Your Honor.  
13 THE COURT: Five days later, right, not what  
14 discovery revealed a year and a half later, right?  
15 MR. BOWMAN: What discovery revealed is only  
16 relevant in one respect. I mean, I think that the  
17 discovery showed A, that he reporter did a significant  
18 amount of research and had three sources for each of  
19 the challenge issues and the reporter tried to confirm  
20 and did confirm to the best of his ability to report  
21 it.  
22 THE COURT: You're talking about something  
23 different.  
24 MR. BOWMAN: Yeah. The second issue, Your  
25 Honor, is the -- what discovery has actually revealed

1 is helpful to know that nothing was fabricated. The  
2 allegations didn't start with Mr. Burke. Mr. Williams  
3 was accused of ordering a bean ball on the field of  
4 play that day by opposing coaches. He admits that.

5 THE COURT: Yeah, that's what I disagree --  
6 here is where I disagree. Post incident discovery that  
7 reveals either falsity or truthfulness is probably  
8 legally irrelevant.

9 It's what the publisher knew at the time and  
10 I think you'll all agree that you pointed out the case  
11 law, that is not an objective standard in terms of  
12 knowing falsity, it's the subject of the standard.  
13 What did in this case, the reporter, I think what was  
14 the reporter's name?

15 MR. BOWMAN: Tim Burke, Your Honor.

16 THE COURT: Burke?

17 MR. BOWMAN: Tim Burke.

18 THE COURT: It's what Burke actually thought  
19 in his mind at the time the articles were published and  
20 even if a reasonable person would have thought these  
21 articles are false, if Burke thought they were true,  
22 then there is no proof of actual malice under the New  
23 York Times be sold in standard.

24 MR. BOWMAN: We certainly agree with that,  
25 Your Honor, and we don't believe there's anything in

1 the record that shows Mr. Burke.

2 THE COURT: All right. But so the only post  
3 incident discovery that's going to matter is what was  
4 revealed in discovery that further puts light on what  
5 was in Burke's head during the two relevant days in  
6 question not on whether or not Burke ultimately is  
7 vindicated or not vindicated and believing or not  
8 believing in the truthfulness of the allegations.

9 MR. BOWMAN: Certainly, Your Honor.

10 THE COURT: What did you want to show me on  
11 the screen?

12 MR. BOWMAN: Well, there -- when Mr. Burke  
13 wrote the second article --

14 THE COURT: Uh-huh.

15 MR. BOWMAN: -- the May 16<sup>th</sup> article, that  
16 article included two of the allegations that are at  
17 issue, the allegation of the P word and the allegation  
18 of the hit batter. And he embedded in his article the  
19 clips that he reviewed when he followed up what he was  
20 told by one source and confirmed that with two other  
21 sources and he put those in the article and to the  
22 extent that Your Honor wanted to see those, we have  
23 those prepared for you.

24 THE COURT: All right.

25 MR. BOWMAN: But I'm happy to talk through

1 what he knew about each of those issues.  
2

3 THE COURT: What's there -- what I've always  
4 said I thought was the worst allegation that was what  
5 we'll call the bean ball incident.

6 MR. BOWMAN: Certainly. So Source Four this  
7 is -- it is relevant that Mr. Burke had reported the  
8 events of game one, he understood the conduct of game  
9 one and he was following a story and so whether or not  
10 it was unlikely to be true, it has to be viewed through  
11 the prism of the reporting he had done about the  
12 ejection at game one.

13 So for game two, Mr. Burke received an email  
14 from Source 4. We produced -- Gawker produced in  
15 discovery all of these written communications redacting  
16 only the source identity and Mr. Burke testified about  
17 all of these communications and the sources and the  
18 best place for that description is the Burke  
19 certification.

20 But Source 4 contacted them and gave him a  
21 description of what happened including, you know, this  
22 -- Mr. Williams ordered the batter be hit. Reported  
23 that to Mr. Burke. Now, in the Lawrence case which is  
24 the Supreme Court case -- that --

25 THE COURT: Well, report -- an email was  
sent to Burke.

1 MR. BOWMAN: Yes.

2 THE COURT: What exactly did the email say?  
3 Where is that in all of this?

4 MR. BOWMAN: The email is the Burke  
5 certification Exhibit --

6 MS. MATTIACCI: It's BB, Your Honor.

7 MR. BOWMAN: The Burke certification, Exhibit  
8 M.

9 THE COURT: Which exhibit is it?

10 MR. BOWMAN: Exhibit M, Your Honor.

11 THE COURT: Yeah.

12 MR. BOWMAN: And the email about half way  
13 down is describing this source is following up and  
14 saying yes, this -- I witnessed game one and I also saw  
15 a game, a championship game the next day and you  
16 wouldn't believe what happened.

17 And this source writes, "But however, this  
18 brings me to yesterday's --

19 THE COURT: Well, how much -- there's like  
20 22 single space lines here. Which line are you looking  
21 at?

22 MR. BOWMAN: The line that starts about two-  
23 thirds of the way down, Your Honor, beginning with the  
24 word "but".

25 THE COURT: "But however this brings me,"

1 all right.

2 MR. BOWMAN: Yesterday's title game.

3 THE COURT: All right.

4 MR. BOWMAN: Right from the get-go he's  
5 tipping off pitches to his kids, was at one point heard  
6 to say by a couple of our coaches and a couple of our  
7 players to our pitcher, don't act like a P, star, star,  
8 star, star, star, I personally didn't hear that  
9 although I don't know why our coaches or kids would  
10 make it up.

11 Every time he would come over to the coaches  
12 -- the first base coach, he would look to start  
13 something with one of our coaches. Later in the game  
14 and obviously this can't be proven but when our pitcher  
15 came to bat, our coaches had said something to the home  
16 plate umpire warning him thinking that our kid was  
17 going to be thrown out.

18 Well, don't you know, first pitch to our  
19 pitcher batting hits him. That was the first tip that  
20 came into Mr. Burke.

21 THE COURT: All right.

22 MR. BOWMAN: Reporting that Mr. Williams had  
23 talked to his player, his coaches thought that --  
24 ordered the player to hit him and the first pitch hits  
25 him.

1 THE COURT: Hold on just one second. Hold  
2 on. Does it say anything that Williams ordered the  
3 pitcher at bat be hit by a pitch?

4 MR. BOWMAN: This source didn't, Your Honor.  
5 This source said what you see here --

6 THE COURT: Right. Right.

7 MR. BOWMAN: -- thinking our kid was going to  
8 be thrown out. So Mr. Burke didn't run with the story.  
9 He didn't print the story based on Source 4. He did  
10 more reporting.

11 THE COURT: All right.

12 MR. BOWMAN: You can see at the bottom of  
13 this email chain, this source provides some additional  
14 information and Mr. Burke starts following up. He  
15 tracks down another source, Source 6, sends Source 6 a  
16 message --

17 THE COURT: All right.

18 MR. BOWMAN: Source 6 then responds, you can  
19 see on Exhibit O there's an email to Source 6 on a  
20 Facebook message. Source 6 responds.

21 THE COURT: Hold on. Hold on. Hold on.

22 MR. BOWMAN: Sorry, it's the --

23 THE COURT: It's a different exhibit.

24 MR. BOWMAN: It's the page marked Gawker  
25 0059, Your Honor.

1 THE COURT: All right. I got it.  
2

3 MR. BOWMAN: And that is a Facebook chat as  
4 Mr. Burke is contacting sources and attempting to  
5 confirm this information.

6 THE COURT: It's a Facebook chat?

7 MR. BOWMAN: It's a Facebook chat record,  
8 Your Honor.

9 THE COURT: All right.

10 MR. BOWMAN: And this individual --

11 THE COURT: Mr. Burke is chatting with this  
12 Source 6?

13 MR. BOWMAN: Yes, Your Honor.

14 THE COURT: On Facebook.

15 MR. BOWMAN: Yes.

16 THE COURT: Okay.

17 MR. BOWMAN: It's a messaging --

18 THE COURT: Yeah.

19 MR. BOWMAN: -- platform, I believe. He asks  
20 for more information and on the next page you can see  
21 Gawker 0060 is Source 6's response.

22 THE COURT: Uh-huh.

23 MR. BOWMAN: "He walked by our catcher and  
24 after the first inning he said that the pitcher is a,"  
25 P word, "a couple of our kids heard him and one kid  
asked his parents on the way home why would he call our

1 pitcher the name," and asked what it meant. He also  
2 called his pitcher and catcher to the side before the  
3 bottom of the fifth inning and told his pitcher to hit  
4 him with the first pitch." And then it goes over, "In  
5 the last inning I heard him and (redacted) pitcher  
6 heard him and (redacted) told the ump."

7 THE COURT: All right.

8 MR. BOWMAN: That's what Source 6, I heard  
9 him.

10 THE COURT: Yeah.

11 MR. BOWMAN: And Tim Burke didn't stop there.  
12 Tim Burke said can you tell me anyone else I can talk  
13 to. Tim Burke if you look ahead, Exhibit P --

14 THE COURT: All right.

15 MR. BOWMAN: -- Tim Burke found another  
16 person who he believed to be at the game and to be a  
17 witness and sent him an email and said, "Hey, can we  
18 talk?"

19 THE COURT: What source is this? What  
20 source --

21 MR. BOWMAN: This would be Source 7.

22 THE COURT: This is Source 7. All right.  
23 All right.

24 MR. BOWMAN: And Source 7 didn't want to do  
25 the communication over email so set up a phone call

1 with Mr. Burke and Mr. Burke testified about his  
2 conversation with Source 7 including that Source 7  
3 confirmed the order hit by batter and confirmed the P  
4 word. And so Mr. Burke then in --

5 THE COURT: Was it clear whether or not  
6 Source 7 had firsthand knowledge or was repeating what  
7 somebody else told him? Was that -- just so I'm clear,  
8 Source 7 is purely Burke saying this is what Source 7  
9 told me there is no documentary email evidence.

10 MR. BOWMAN: Yes, Your Honor. This was a  
11 telephone conversation.

12 THE COURT: All right. Does Burke say that  
13 Source 7 said that he, he being Source 7, had firsthand  
14 information, I'm not talking about the P word now,  
15 we're talking about the beaning, or that somebody told  
16 Source 7 that that's what happened?

17 MR. BOWMAN: Source 7 told that to Mr. Burke.  
18 I don't know, I can't recall in the testimony whether  
19 Mr. Burke was asked specifically whether he asked  
20 Source 7 if it was a personal observation. Mr. Burke  
21 knows the answer to that question, but it's difficult  
22 to reveal that without revealing the identity of Source  
23 7.

24 THE COURT: Well, there's the bottom line.  
25 I don't want to know what -- it doesn't matter to me

1 what the real answer is. What is the materials before  
2 me on the summary judgment motion reveal about whether  
3 or not Source 7's information was hearsay or non-  
4 hearsay?

5 MR. BOWMAN: Source 7 said that the SJ  
6 Titan's catcher reported that Williams called the  
7 pitcher if you were --

8 THE COURT: Start from the beginning. Where  
9 are you reading from?

10 MR. BOWMAN: I'm sorry. This is the Burke  
11 certification paragraph 28.

12 THE COURT: All right. Which says?

13 MR. BOWMAN: And reported that Williams  
14 called -- and said that Williams -- wait a minute. And  
15 believed the player was going to be thrown out. That's  
16 what the -- the person said.

17 THE COURT: All right. Well --

18 MR. BOWMAN: I will say about the hearsay  
19 point, Your Honor, there is no requirement that  
20 journalists can only get information of personal  
21 intervention.

22 THE COURT: I understand that. What I'm  
23 trying to -- I understand that but that's true but the  
24 flip side is also true, generally speaking the law  
25 recognizes that individuals that report personal

1 information based upon personal knowledge have more  
2 reliability than individuals repeating what might be  
3 triple hearsay or that type of thing.

4 So you're right, and particularly when it  
5 deals with the defamation of a public figure and the  
6 standard is so high in terms of the clear and  
7 convincing hearsay and triple hearsay might be  
8 sufficient. But in terms of trying to get a handle on  
9 how reliable or unreliable this evidence is, which  
10 ultimately is what I have to do.

11 In fact, it's the plaintiff's job to prove  
12 that they were very -- as a whole was very unreliable  
13 it's important to know whether or not the information  
14 is first-hand information or whether or not it might be  
15 hearsay. The best -- from what you presented to me,  
16 the best I can say is that it's not clear whether it  
17 was hearsay or non hearsay.

18 MR. BOWMAN: Your Honor, I would respectfully  
19 disagree with you on one point. I think the  
20 reliability would to to an objective standard,  
21 negligence. The question here isn't whether it was  
22 reliable, it's whether there's any clear and convincing  
23 basis to believe that when three sources independently  
24 told Mr. Burke that this happened --

25 THE COURT: But you're combining it now.

1 MR. BOWMAN: -- that it matched the video --

2 THE COURT: That he knew it was false.

3 THE COURT: Is it Mr. O'Connor -- Mr. --

4 MR. BOWMAN: Mr. Bowman, Your Honor.

5 THE COURT: Mr. Bowman, all right. You're  
6 conflating an apple with an orange. You're exactly  
7 right, I look upon this as a totality. I don't just  
8 break it up into pieces and say this is triple hearsay,  
9 this is double hearsay.

10 If I have three sources and if they're truly  
11 independent of each other, which we don't really know,  
12 this can be some guy, his brother and his sister  
13 calling and I don't know, all right, it's more reliable  
14 the more independent they are. It's a matter of common  
15 sense.

16 And it may be there are three independent  
17 sources all reporting triple hearsay, they'll all be  
18 reporting the same one false allegation or they may --  
19 one of them, you know, may be a separate source. But  
20 it seems to me that it's incumbent upon the Court in  
21 examining this evidence to make some determination as  
22 to the individual reliability of each piece sitting by  
23 itself and then doing the more difficult job and  
24 determining even if one piece sitting by itself isn't -  
25 - wouldn't be reliable enough to get a search warrant,

1 for example --

2 MR. BOWMAN: Uh-huh.

3 THE COURT: -- all right, but taking this  
4 totality is sufficient to at least allow publication,  
5 in reference to a public figure without having the  
6 media publisher sue for defamation. So but from what  
7 you've presented, I think I can fairly characterize it  
8 as being unclear if it's hearsay or non-hearsay.

9 I'm talking just now about Source 7.

10 MR. BOWMAN: For Source 7, I agree, it's  
11 personal observation and maybe one level of hearsay. I  
12 think it's worth thinking about --

13 THE COURT: No, but the beaning is not  
14 personal observation.

15 MR. BOWMAN: No, it's personal observation of  
16 the exchange and the hit batter and what the batter  
17 said.

18 THE COURT: All right. But -- all right.

19 MR. BOWMAN: But I think it's worth looking  
20 at the cases. The most recent --

21 THE COURT: I want to deal with the evidence  
22 first. By the way, we need to break pretty soon, not  
23 for me, but for my court clerk, BeBe (phonetic) and my  
24 law clerk here, Mr. White.

25 MR. BOWMAN: Yes, sir. I'm sorry.

1 THE COURT: We're not going to finish this  
2 today. I have to call it a day at four o'clock. It's  
3 not because I don't want to work beyond four o'clock,  
4 it's because we have to start paying staff overtime  
5 after four o'clock and we're under very strict orders  
6 given budgetary problems in not doing that unless it's  
7 a judicial emergency.

8 I don't want to impose upon anybody, but I'm  
9 available as early as Tuesday morning. Monday of  
10 course, we're down. Anybody not available to come back  
11 either Monday morning or Monday --

12 MS. MATTIACCI: Tuesday, Judge.

13 THE COURT: Tuesday. Tuesday morning. I  
14 could do it Monday also.

15 MR. BOWMAN: Your Honor, I have an appellate  
16 argument out of town on Tuesday morning, I'm sorry.

17 THE COURT: All right. How about Tuesday  
18 afternoon?

19 MR. BOWMAN: It's in Chicago. I don't think  
20 I'll be back by Tuesday afternoon.

21 THE COURT: All right. Well, you're going  
22 to need to discuss the sooner the better, but there's  
23 no way I'm going to rush this through and I'm not going  
24 to finish before four o'clock.

25 MR. BOWMAN: Okay.

1 THE COURT: All right? I hope to finish the  
2 beaning before four o'clock but there are other  
3 allegations and I've got to go through the record and  
4 make factual determinations as to the reliability as to  
5 each piece and the reliability total and then whether  
6 or not it was so unreliable that it must have been that  
7 Mr. Burke could not believe what he had published,  
8 right? All right?

9 So we'll need to -- let's go -- do you need  
10 to take a break now? Anybody need to take a break? All  
11 right. Let's go further. All right.

12 So we have three sources. Are those the  
13 three sources for it?

14 MR. BOWMAN: Those are the three sources for  
15 the hit batter, Your Honor.

16 THE COURT: All right. Was he aware of any  
17 contradictory sources?

18 MR. BOWMAN: The -- he was aware that when  
19 confronted with the accusation Mr. Williams said I told  
20 him to pitch inside which was fully reported in the  
21 story. And, in fact, is Mr. Williams' litigation  
22 position. The story relied on source four, six, and  
23 seven --

24 THE COURT: Yeah.

25 MR. BOWMAN: -- relied on Mr. Burke's viewing

1 of the videotape that appeared to corroborate what he  
2 was told and --

3 THE COURT: How long is the videotape? How  
4 long is the videotape that you wanted to play?

5 MR. BOWMAN: The videotape is 30 seconds, 40  
6 seconds.

7 THE COURT: All right. Let's dim the lights  
8 and play it. Are you ready to play it now?

9 All right. Mr. Burke had played the video  
10 before this was all published?

11 MR. BOWMAN: Yes, Your Honor, and in the  
12 story embedded two clips that he understood  
13 corresponded with what the three sources each had told  
14 him about the P-word allegation and about the hit by  
15 pitch. And this is the clip that he put in about the  
16 hit by pitch.

17 (Videotape is played.)

18 (Videotape concluded.)

19 MR. BOWMAN: So, Your Honor, what Mr. Burke  
20 wrote in his certification is that what he saw here was  
21 Mr. Williams coming out and talking to his catcher.  
22 The catcher then going out and talking to the pitcher,  
23 the very first live pitch thrown at the next batter,  
24 struck the batter and both the coaches come to the  
25 line.

1 THE COURT: Replay that again. I missed  
2 that part. Replay that again.  
3

4 MR. BOWMAN: Okay.  
5

6 THE COURT: I don't mean the whole thing,  
7 the part of Mr. Williams coming out right before the  
8 pitch.  
9

10 MR. BOWMAN: At the very beginning, I think.  
11 (Videotape is played.)  
12

13 MR. BOWMAN: Mr. Williams is in the red shirt  
14 with the white hat, Your Honor.  
15 (Videotape is concluded.)  
16

17 THE COURT: All right. And then the first  
18 pitch is what we just saw. Right.  
19

20 MR. BOWMAN: And then there a couple of warm  
21 up pitches and then the first live pitch, the batter.  
22 And we would submit the issue, this isn't a situation  
23 like Connitan (phonetic) where the reporter had a good  
24 story and purposely chose not to watch the video  
25 because he didn't want to ruin it.

26 The reporter confirmed what he thought he  
27 knew with multiple sources and went and watched the  
28 video and what he saw on the video as he wrote in his  
29 certification was Mr. Williams talking to the catcher,  
30 the catcher talking to the pitcher and the first live  
31 pitch hitting the batter and the coaches coming down to

1 complain.  
2

3 Now, I don't know standing here could I swear  
4 the Mr. Williams ordered the bean ball? Of course not.  
5 But Mr. Burke saw nothing in this video that convinced  
6 him that that was the -- that what all three of his  
7 sources were telling him was false.  
8

9 THE COURT: Yeah, but you kind of play  
10 doubles advocate. What could he have seen that would  
11 have -- I mean, nobody disputes that the opposing kid  
12 got hit, right?  
13

14 MR. BOWMAN: No one disputes that.  
15

16 THE COURT: So what is it likely to have  
17 shown that would have contradicted the sources?  
18

19 MR. BOWMAN: He's practicing good journalism,  
20 Your Honor. He had three sources tell him this. He  
21 went and looked at it to see if it looked right to him  
22 and as he testified it did.  
23

24 THE COURT: I don't see -- my take is a  
25 little bit different. Certainly nothing inconsistent on  
the video with what sources, four, six, and seven are  
alleging, but the conduct appears to be on its face  
innocuous. The manager speaks to the catcher, the  
catcher speaks to the pitcher. Just out of curiosity,  
why wouldn't the manager, if the manager wanted the  
pitcher to hit the opposing kid, why wouldn't he have

1 just spoken directly to the pitcher?

2 MR. BOWMAN: I don't know that, Your Honor.  
3 I mean, at the -- you know, at most, it's ambiguous,  
4 but Mr. Burke had a reasonable understanding based on  
5 the resources --

6 THE COURT: We're getting into the argument,  
7 but I understand. I just wanted to see what -- all  
8 right. So you're telling me that what we have that  
9 might have been contradictory is Mr. Williams' own  
10 statement? Was there anything else that Burke had that  
11 contradicted what either four, six, or seven were  
12 saying?

13 MR. BOWMAN: No, Your Honor.

14 THE COURT: All right. Let me go -- who is  
15 arguing this part of it? Ms. Mattioli (sic)?

16 MS. MATTIACCI: Yes, Your Honor.

17 THE COURT: All right. Do you disagree with  
18 anything factually that Mr. Bowman has alleged?

19 MS. MATTIACCI: Absolutely, Your Honor.

20 THE COURT: All right. What do you have?

21 MS. MATTIACCI: Okay. There is one single  
22 source that talks at all about any kid being hit,  
23 that's it. There is zero --

24 THE COURT: What source is that?

25 MS. MATTIACCI: Six.

1 THE COURT: So you're saying only Source 6.

2 MS. MATTIACCI: Yes. And Source 6 does not say  
3 anything about a bean ball. He puts bean ball in the  
4 headline. Bean ball has a specific meaning, it's a --

5 THE COURT: Hold on.

6 MS. MATTIACCI: -- it's a ball to the head.

7 THE COURT: All right. Source 6 is --  
8 Source 6 --

9 MS. MATTIACCI: I believe it's Exhibit O to  
10 defendant's motion, it's that Facebook chat.

11 THE COURT: All right. Here it is. But the  
12 email says if this is Source 6, I'm going to write it  
13 down. This is Source 6. "He also called his pitcher  
14 and catcher to the side before the bottom of the fifth  
15 inning and told his pitcher to hit him with the first  
16 pitch." That seems pretty clear to me. What is  
17 ambiguous about that?

18 MS. MATTIACCI: That does not say he ordered a  
19 bean ball. Bean ball has a specific meaning. It's a  
20 ball to the head. I'm just starting with -- like those  
21 are layers, but argument number one not a single  
22 source, zero, says the word bean ball. Bean ball is  
23 not shown on a video. Bean ball never happens. It's a  
24 complete and total fiction. He wrote a fiction in a  
25 headline.

1 THE COURT: But you're arguing again. You  
2 acknowledge that there was at least one source that  
3 directly said that Mr. Williams requested or whatever  
4 the appropriate terms is that the pitcher hit the  
5 opposing batter with the first pitch.

6 MS. MATTIACCI: Right. So you have -- so he  
7 has this one source, that's it. Those other sources  
8 are just repeating what this source says. There's no  
9 other independent source.

10 Mr. --

11 THE COURT: Well, how do you know that  
12 they're repeating in the sense of that --

13 MS. MATTIACCI: Because there's nothing --  
14 there is -- Source 4.

15 THE COURT: I don't know -- here's the  
16 problem. I don't know whether or not there's a  
17 relationship between four, six, and seven at all. I  
18 don't know. Maybe there is, maybe there is not. The  
19 record isn't clear. For all I know is six may have  
20 asked four and seven to send emails and letters and  
21 phone calls to try to set up -- set Williams up or it  
22 can be opposite each one was separately outraged by  
23 what they had seen and on their own decided to contact  
24 the media.

25 The record is not clear as to that in part

1 because these are confidential sources -- they're not  
2 anonymous sources, they're confidential sources, it's  
3 one of your bones of contention in your expert's report  
4 which by the way I will resolve before four o'clock and  
5 get that out of the way, probably right after this,  
6 this particular issue.

7 But --

8 MS. MATTIACCI: May I address Source 4?

9 THE COURT: Yes.

10 MS. MATTIACCI: Source 4 says, "Later in the  
11 game --

12 THE COURT: Hold on.

13 MS. MATTIACCI: Sure.

14 THE COURT: All right. Later in the game --

15 MS. MATTIACCI: "And obviously this can't be  
16 proven but when our pitcher came to bat, our coaches  
17 had said something to the home plate umpire warning him  
18 thinking that our kid was going to be thrown at."

19 There's nothing in there that says that Mr.  
20 Williams ordered bean ball or ordered a kid to be hit.  
21 Nothing.

22 THE COURT: I don't disagree with that.

23 MS. MATTIACCI: Okay.

24 THE COURT: All right.

25 MS. MATTIACCI: So then Source 7 testified in

1 deposition because we have no notes, no email, no  
2 Facebook from Seven, but Seven does not testify as to  
3 personal knowledge. He testifies as to what he heard  
4 from other people.

5 THE COURT: Right.

6 MS. MATTIACCI: So the only one we have is  
7 Source 6. Now, Mr. Burke, the reporter, this is --  
8 what you saw right now is Mr. Burke's version that he  
9 cropped and edited from the original tape that he saw.  
10 The original tape that he reviewed was on Ripken's  
11 website and we have it for you to play for you.

12 THE COURT: All right.

13 MS. MATTIACCI: It's a much wider screen and  
14 you can see from the end of the top of the fifth to the  
15 beginning of the bottom of the fifth, the entire break.  
16 So in hands he has this Source 6 and his Source 6 says,  
17 "He also called his pitcher and catcher to the side  
18 before the bottom of the fifth inning and told his  
19 pitcher to hit him with the first pitch." Mr. Burke  
20 then looks at the full video that you didn't get to see  
21 and nowhere, nowhere does Mr. Williams call his pitcher  
22 and catcher to the side. It doesn't happen.

23 THE COURT: Mr. Williams spoke to the  
24 catcher?

25 MS. MATTIACCI: Mr. Williams only spoke to the

1 catcher at one point, okay? So what he -- so what Mr.  
2 Burke does when he publishes his article, he does not  
3 state what his only source said. His only source said  
4 he called his pitcher and catcher to the side before  
5 the bottom of the fifth and told his pitcher to hit  
6 him.

7 He hasn't published that. Instead, he makes  
8 up a new story and says that Mr. Williams told the  
9 catcher and then the catcher told the pitcher and so he  
10 has his own story and then he crops and edits the video  
11 so you can only see part of the video that matches the  
12 new story that he made up because he knew he did not  
13 have video that matched the only source that he had.

14 That -- if that isn't reckless disregard of  
15 the truth. He -- what was he going to do? Publish  
16 this and then play that? He can't.

17 THE COURT: Just so I'm clear, I haven't  
18 seen what you were mentioning have I?

19 MS. MATTIACCI: I -- well, it's in the -- we  
20 submitted it with the briefs but --

21 THE COURT: All right. But

22 MS. MATTIACCI: But, you know, we submitted  
23 two clips.

24 THE COURT: You're going to have to play it.

25 MS. MATTIACCI: Okay.

1 THE COURT: We're going to take a break, but  
2 before we do that, I do want to discuss because I can  
3 probably handle it quickly. Are you talking about  
4 these things?

5 MS. MATTIACCI: Uh-huh.

6 THE COURT: All right. Do you want these  
7 back? Do you have your own copies?

8 MS. MATTIACCI: We have our own copies. You  
9 can have them, Your Honor.

10 THE COURT: All right. Let's deal with the  
11 issue before we take a break of the late expert's  
12 report or who wants to argue that first? Are you Mr.  
13 Kelley?

14 MR. KELLEY: I am Mr. Kelley, Your Honor.

15 THE COURT: All right. I got one right.  
16 All right.

17 MR. KELLEY: I don't want to --

18 THE COURT: All right. Complainant serves  
19 an expert report on you from professional journalist  
20 the day of the discovery end date.

21 MR. KELLEY: That's right.

22 THE COURT: At five o'clock or whenever it  
23 was. All right? All right?

24 MR. KELLEY: All right. I won't --

25 THE COURT: The only thing that they did

1 wrong as I can see is that they, they being the  
2 plaintiffs, did not attach a 417-7 certification at  
3 that time to indicate that the due diligence, they  
4 couldn't have served it on you before then. Right?  
5 That wasn't done, right?

6 MR. KELLEY: That's right.

7 THE COURT: All right. Had it been done  
8 with what they later did do, on the merits what would  
9 your argument be, because they're saying we need to get  
10 all of these depositions done before we give it to our  
11 expert, we didn't want to basically do amended reports  
12 one after another so it wasn't until towards the end of  
13 the discovery period that we finished the depositions  
14 which probably is true, they gave the dates, that's the  
15 earliest they got the report.

16 MR. KELLEY: Your Honor, this was a very  
17 time intensive period so, you know, every two or three-  
18 week increment is a big deal. It wasn't just a failure  
19 to serve the certificate. The problem with the  
20 certificate is that it ignores that they knew well both  
21 what the opinions were going to be and the fact that  
22 they were going to rely on expert which is all we  
23 needed to know to be able to get going on vetting their  
24 expert, preparing for a deposition, starting to look  
25 for our expert which, you know, finding one that can

1 give testimony by June now or three weeks ago is  
2 something that would have been impossible.

3 They knew everything except what occurred in  
4 two depositions.

5 THE COURT: Let me ask you this. Suppose 21  
6 days before the discovery end date they said that  
7 Andrew Verzilli (phonetic) and what's Kaplan's  
8 captain's first name?

9 MR. KELLEY: Joel.

10 THE COURT: Joel Kaplan are going to be  
11 experts, Kaplan is going to be testifying about opining  
12 about professional standards in journalism, Verzilli is  
13 going to give the standard economics report, right, and  
14 that was done 21 days before, but you don't have the  
15 reports. What are you going to do other than --

16 MR. KELLEY: I can -- I can -- excuse me.

17 THE COURT: Yeah.

18 MR. KELLEY: I can do an awful lot  
19 researching and vetting an expert before I even know  
20 his opinions but the problem is that these last two  
21 depositions they're supposedly waiting for were  
22 witnesses how had no contact whatsoever with Mr. Burke,  
23 hence all they could say is perhaps what Mr. Burke  
24 might have learned had he contacted with them, what  
25 these witnesses had to say was not relevant to Burke's

1 state of mind, not even relevant to his adherence to  
2 journalistic practices.

3 THE COURT: What was the date of the last  
4 deposition that would have been relevant to Burke's  
5 professional standards?

6 MR. KELLEY: I'm going to need some help on  
7 that, it would be the last deposition before

8 MR. BOWMAN: It's in Burke's deposition.

9 MR. KELLEY: Mr. Burke's deposition was  
10 February 17th and I don't think there was after that  
11 any deposition of any witness that he had contact with.

12 THE COURT: All right. All right. Who is  
13 going to be arguing on behalf of the plaintiff for  
14 this?

15 MS. MATTIACCI: I am, Your Honor.

16 THE COURT: Ms. Mattiacci?

17 MS. MATTIACCI: Yes.

18 THE COURT: Well, why wasn't a 4-7 -- the  
19 first problem you have is the easiest one, why wasn't a  
20 417-7 certification attached with these expert reports  
21 when they were served on the last day of discovery?

22 MS. MATTIACCI: Yeah, all I can say is it  
23 should have been, you know and --

24 THE COURT: All right.

25 MS. MATTIACCI: -- you know, we just -- we're

1 as diligent as we could be given the circumstances and  
2 the amount of depositions that were being taken that  
3 month and we didn't know what the deposition testimony  
4 was going to be until it was taken and so to the extent  
5 --

6 THE COURT: Well, do you agree that at least  
7 that some of those depositions did not relate to the  
8 professional standards of Mr. Burke?

9 MS. MATTIACCI: No, I don't believe so because  
10 they are information that had to do with what occurred  
11 and sources that he could have contacted. They are  
12 obvious sources of --

13 THE COURT: Uh-huh.

14 MS. MATTIACCI: -- that were available to him.

15 THE COURT: Right.

16 MS. MATTIACCI: We told Gawker that if they  
17 wanted to depose him we are 70 days before a trial date  
18 was scheduled, summary judgment motion is pending we  
19 would make him available for depositions and --

20 THE COURT: I want to be clear on the  
21 record. Did you disclose the identity of either the  
22 captain or Verzilli before the last day of discovery?

23 MS. MATTIACCI: No, Your Honor.

24 THE COURT: Why not?

25 MS. MATTIACCI: It was just we were -- the

1 day we got the report and we saw it was a report that  
2 we could use, we disclosed that. I mean, not until  
3 that time did we know that we would definitely be using  
4 the reports.

5 THE COURT: All right. Mr. Kelley, here is  
6 the problem. The best practice has been around now in  
7 this state for 16 years and five months and trial court  
8 judges still struggle with how strictly to enforce the  
9 various rules concerning discovery practices.

10 Technically, you're right. This amendment  
11 was served more than 20 days before the discovery end  
12 date. That kicked in 417-7. 417-7 unique among the  
13 rules of court actually contains the remedy for a  
14 violation of it.

15 It says that the 417-7 certification is not  
16 attached we have the amendment to answers to  
17 interrogatories the receiver of the amendment may act  
18 like he or she never got it and also puts the onus on  
19 the receiver if there is a 417-7 certification and you  
20 want to contest it, you've got to file a motion  
21 contesting it within 20 days.

22 So I could say that's the one court rule of  
23 all of them, this whole book, there's well over a 1,000  
24 pages now, well over 2,400 pages now, and growing where  
25 the remedy for the violation is built into the rule.

1 At least in terms of the civil practice. There might  
2 be some family. That's just a bad memory to me now and  
3 criminal, I'm not even going to express an opinion on.  
4

5 But most trial judges don't do that. There is  
6 the de facto practice and even though the rule  
7 specifies 20 days before the discovery end date, most  
8 attorneys think they have pretty much free range to  
9 serve anything they want until the discovery end date.  
10

11 The defense can protect themselves in this  
12 context by getting a court order that requires the  
13 plaintiff to serve the expert reports or at least  
14 identify their experts well before the discovery end  
15 date. Was that done in this case?

16 MR. KELLEY: A request for a court order was  
17 not made.

18 THE COURT: All right. All right. That's  
19 not to be critical, but there are mechanisms that are  
20 available to prevent one side from at the -- literally  
21 the last minute from dumping on the other side  
22 amendments to answers to interrogatories.

23 This is an unusual case. It presents  
24 complications and issues. There's a lot of money at  
25 stake, et cetera, et cetera. It's not a simple one car  
hitting another car, all you have to do is line up the  
orthopedic surgeon or the chiropractor and the case is

1 ready to proceed.

2 My inclination is to permit the amendment and  
3 then permit the defense a reasonable amount of time to  
4 respond to both experts. That's what 99 percent of the  
5 judges out there would do and I'm not a one-percenter,  
6 at least I don't think I'm a one-percenter.

7 So if that's the remedy did you want to  
8 respond to it?

9 MR. KELLEY: If that's the remedy, the  
10 problem is that it's just physically impossible for me  
11 to prepare myself by deposing the witness and finding  
12 and vetting and preparing a responsive expert before  
13 the trial date.

14 THE COURT: Well, the trial date gets moved.

15 MR. KELLEY: I would request that as the  
16 minimal remedy that fairness requires in this  
17 situation.

18 THE COURT: All right. Well, we're going to  
19 take a break. Think about how much time you need, the  
20 trial date will have to be moved. I will reopen  
21 discovery to allow a discovery deposition if you want  
22 to of the plaintiff's experts that will allow you to  
23 get a response report from either the economist and  
24 slash or the professional standards expert or move the  
25 trial date and then we'll see where we go at that point

1 in time. All right?

2 MR. HUGHES: Your Honor?

3 THE COURT: Yes, Mr. Hughes?

4 MR. HUGHES: I did not make this motion  
5 because it was a motion in limine and Your Honor  
6 appeared to want it closer in time. I would just add -  
7 -

8 THE COURT: Well, let me explain that, let  
9 me go further. There may be some confusion. The court  
10 rules actually specify that motions in limine are not  
11 supposed to be placed on the regular Friday motion  
12 docket. So that's why you got the form letter in the  
13 mail.

14 But I think everybody was correct in that  
15 since in order to determine at least some of the  
16 motions you have to determine the admissibility of the  
17 report one goes with the other. So that's why I'm  
18 deciding now rather than, you know, an hour before jury  
19 selection, that type of thing.

20 MR. HUGHES: Sure.

21 THE COURT: All right.

22 MR. HUGHES: And again, I would just observe  
23 that Mr. Kaplan, I don't think really pertains to  
24 anything directly related to MLB Network.

25 However, with respect to Mr. Verzilli --

1 THE COURT: Right.

2 MR. HUGHES: -- the rule 417-7 certification  
3 that was submitted even belatedly doesn't even  
4 undertake to give good cause --

5 THE COURT: All right. I'll deal with that  
6 separately, fair enough.

7 MR. HUGHES: It's --

8 THE COURT: All right. Ms. Mattiucci (sic)  
9 -- am I pronouncing your last name correctly?

10 MS. MATTIACCI: Mattiacci. That's fine.  
11 Anything.

12 THE COURT: Mattiacci, you appear before me,  
13 I always butcher their names.

14 MR. KELLEY: Your Honor, before you pass on  
15 from me there was a second aspect of our motion just  
16 dealing with relevance. I trust you're going to deal  
17 with that down the road?

18 THE COURT: Yes, but I -- he -- you're  
19 talking about Kaplan, I assume, not Verzilli.

20 MR. KELLEY: Yes.

21 THE COURT: Well, he discusses -- he  
22 discusses -- those were tricky issues and frankly I'm  
23 more inclined to punt those until we get closer to the  
24 trial since it may be that some of his opinions are  
25 barred, some of them aren't, I read his report

1 yesterday and it kind of -- it kind of summarizes the  
2 defense -- the plaintiff's position about these things  
3 is the way I would categorize it, but you know, there  
4 are plenty of cases if you want I can cite them, that  
5 discourage trial court judges from making in limine  
6 rulings concerning the admissibility of expert opinion  
7 before they've had a much better sense of the case and  
8 I wasn't surprised -- I mean, one issue that the expert  
9 spends a lot of time on is whether or not there was a  
10 professional obligation to speak directly to Mr.  
11 Williams before publishing these articles and he says  
12 that there was.

13 There was also a lot of time spent discussing  
14 whether or not sources that did not request  
15 confidentiality be in essence sua sponte by Mr. Burke  
16 granted confidentiality. But if I deal with those  
17 arguments on the merits, it's not going to be between  
18 now and four o'clock, it may not be next week and it  
19 may not be until we get much closer to trial.

20 But right now what I'm inclined to do is  
21 determine whether or not there was a discovery  
22 violation by the plaintiff that requires me to bar  
23 either Kaplan or Verzilli. I'm satisfied as to Kaplan  
24 that the need to accumulate some deposition transcripts  
25 justified the service of the report more than 20 days

1 before the discovery end date, but who raised the issue  
2 concerning Verzilli?

3 MR. HUGHES: I'm sorry.

4 THE COURT: Mr. Hughes raised the issue  
5 concerning Verzilli so and Ms. Mattiucci, Mattiacci,  
6 what's your response to that?

7 MS. MATTIACCI: Well, I mean, I don't know why  
8 MLB is even concerned because it's a breach of contract  
9 action against them so it's just the balance of the  
10 contracts, we don't need Verzilli for that.

11 In terms of the future economic loss --

12 THE COURT: I could ask Mr. Hughes why he's  
13 concerned about that if you want.

14 MR. HUGHES: Because the report has some  
15 accumulation of damages, you know, add on finitum until  
16 Mr. Williams supposedly retires and that's precisely  
17 why I'm concerned about it is that it has no --

18 THE COURT: Well, Mr. --

19 MR. HUGHES: That portion has no relevance  
20 to us. It also indicates that there are amounts that  
21 need to be deducted because Mr. Williams would have had  
22 to undertake expense to comply with the contract. I  
23 agree with the concept. I don't necessarily agree with  
24 that expert's number.

25 THE COURT: The objection, there are two

1 separate objections. One objection is is that on the  
2 merits there are parts of the report that ought to be  
3 barred and the other objection is that if the report is  
4 being served on an untimely basis. Are you asserting  
5 both or just one?

6 MR. HUGHES: I'm sorry, Your Honor. I was  
7 only responding to the question as to why I even cared  
8 about it.

9 THE COURT: You're objecting on the basis  
10 that it's out of time.

11 MR. HUGHES: I'm objecting on the basis that  
12 it's out of time --

13 THE COURT: All right.

14 MR. HUGHES: -- that there was no  
15 certification given at all at the time.

16 THE COURT: All right.

17 MR. HUGHES: And the basis of the expert's  
18 report is Mr. Williams' financial information. It was  
19 all totally within his control at all times. He didn't  
20 have to wait for a deposition or an interrogatory or --

21 THE COURT: All right.

22 MR. HUGHES: Or the word of God.

23 THE COURT: Ms. Mattiacci?

24 MS. MATTIACCI: We were just intending to  
25 give the most updated economic loss report we could.

1 We didn't -- there was no set expert report deadline in  
2 the scheduling order. We believe that we had to serve  
3 it by the end of the discovery deadline. We weren't  
4 sitting on it. We got it right as we received it, it  
5 went out the door to them as soon as possible.

6 THE COURT: The answer is is that for  
7 somebody to actually 21 -- suppose these reports at  
8 least in rough draft form were sitting on somebody's  
9 desk 22 days before the discovery end date and somebody  
10 picked up the court rule book and actually read 417-7  
11 there would have been a suspicion that maybe we can't  
12 wait till the discovery end date, maybe we have to  
13 serve this tomorrow but I don't want to come down too  
14 hard on the plaintiffs and a lot of lawyers regard the  
15 discovery end date in that 20 days before the discovery  
16 end date as the drop dead, so to speak, deadline for  
17 service and absent a court order that requires the  
18 service of expert reports at some earlier point in time  
19 to avoid this various situation most trial court judges  
20 myself included are reluctant to start carving out  
21 either side's case when there have been these type of  
22 discovery violations particularly when I can address it  
23 by giving the other side ample time if they wish to get  
24 an expert that will respond to the late serve.

25 So there really isn't a particularly

1 compelling reason for Verzilli to have been served on  
2 the last day of discovery rather than 20 days before  
3 discovery but because of Appellate Division reversals  
4 and because the practice tends to be that before  
5 leniency when at least the report is served before the  
6 discovery end date and that six month after the  
7 discovery end date we see too much of that too but  
8 that's a different problem is that the remedy is not  
9 bar the report, the remedy is to afford you, Mr.  
10 Hughes, much like I gave to Mr. Bowman adequate time to  
11 respond.

12 All right? Let's take a break. Let's take  
13 10-15 minutes.

14 (Recess)

15 THE COURT: All right. We're back on the  
16 record. All right. We left off on the issue  
17 concerning the Verzilli report I think I indicated that  
18 the Court's treat those type of violations with some  
19 leniency.

20 So that's what my inclination is; is to allow  
21 both reports in and allow the defense ample opportunity  
22 to either take a discovery deposition and, slash, or  
23 have their own experts. Anybody want to be heard about  
24 that and if it means postponing the trial, postpone the  
25 trial.

1 MR. KELLEY: I don't think, you know, given  
2 Your Honor's ruling on that I have any disagreement  
3 except that certainly it would make it impossible for  
4 us to get the on experts without postponing the trial.

5 THE COURT: And that's a given. When is the  
6 trial date?

7 MR. HUGHES: June 27th.

8 THE COURT: Yeah, that would be postponing  
9 it till after Labor Day. I'm going to -- by the way,  
10 do you want to hold the settlement conference? I  
11 highly recommend you get either somebody an attorney  
12 that both side trust. Thank you. Just one second.

13 Order a retired judge, et cetera, et cetera,  
14 et cetera, that will devote an entire to this thing. I  
15 don't have an entire day to devote to a settlement  
16 conference.

17 MR. HUGHES: Your Honor, can I --

18 THE COURT: I'm not forcing anybody, but  
19 that would be my recommendation.

20 MR. KELLEY: And I just remind Your Honor,  
21 actually, I noticed one out for a settlement conference  
22 in front of Your Honor on June 6th so everybody can --

23 THE COURT: The computer is my friend. Hey,  
24 BeBe, if you do nothing else today, I want you to  
25 remove this case from the settlement conference.

1 THE CLERK: Should we cancel it?  
2

3 THE COURT: Yeah, I'm going to give you a  
4 trial date obviously for the fall and I'm not forcing  
5 or twisting arms, but if you all want a real settlement  
6 conference before a judge that is better at settling  
7 cases than I do, I'm very lackadaisical about settling  
cases.

8 I'm one of the few people that believe that  
9 more cases should go to trial rather than less. It  
10 keeps everybody in the system honest if we tried more  
11 cases. So I don't squeeze arms. If you want and there  
12 are judges out there that are very good. Most of you  
13 know who they are and I'm perfectly willing to  
14 accommodate the trial date to allow you time. Some of  
15 them are very busy and takes some time to get booked by  
16 them.

17 But if that's what you want to do, by all  
18 means, see if you can agree on an arbitrator and a date  
19 and if it means postponing the trial a little bit more  
20 I'm glad to accommodate it. All right? All right.

21 Let's go back now to -- all right. So I'm  
22 denying the motion to bar both reports. How much time  
23 do you think you'll need, Mr. Bowman?

24 MR. BOWMAN: Your Honor, I have the month of  
25 June where I can hopefully get the deposition of Mr.

1 Kaplan in. I'm gone the month of July and will need  
2 some time to work with an expert --

3 THE COURT: Sounds like we're talking about  
4 120 days give or take. Does that sound reasonable?

5 MR. BOWMAN: At least and I have some other  
6 issues we need to talk about. One is our admitted  
7 counsel in Pennsylvania is on maternity leave until  
8 November.

9 THE COURT: All right. Does the -- you mean  
10 the prog nece counsel? Who is the admitted -- you're  
11 the prog nece county, you're the maternity person?

12 MR. BOWMAN: I'm from Colorado.

13 THE COURT: Who is the maternity person?

14 MS. SEIDLIN-BERNSTEIN: I'm the New Jersey  
15 attorney and also the maternity person.

16 THE COURT: All right. Well but who needs  
17 the -- I hate to just postpone everything until  
18 November, right? Is there any reason why this stuff  
19 can't get done in the next 120 days?

20 MR. BOWMAN: I just don't know because I  
21 haven't explored schedules for counsel deposing  
22 experts.

23 THE COURT: All right. Here is what I'm  
24 going to do. I'm going to give you the 120 days. I'm  
25 going to give you a new trial date now. If it looks

1 like as time goes on that things are becoming difficult  
2 for any reason as the old saying goes, we're open 8:30  
3 to 4:30, arrange a conference call and I'm glad to  
4 discuss it.

5 I did discuss -- what's 120 days -- it's May  
6 27th -- our new discovery end date is September 27th.  
7 But for the limited purpose of addressing the Verzilli  
8 and Kaplan expert reports. All right? We'll give you  
9 a trial date in -- it doesn't work to give you a date  
10 between Thanksgiving and Christmas, too many holidays,  
11 too much going on.

12 I'm glad to give you the first day in  
13 January. I don't have my 2017 calendar. I only have  
14 the 2016. Do you have a 2017?

15 THE CLERK: Yes, I do.

16 MS. MATTIACCI: Your Honor, if there is any  
17 way we can make it earlier. I mean, we're going to  
18 have the next -- it's actually more than 120 days from  
19 today because it's four months from today that you're  
20 making the discovery end date.

21 THE COURT: Right. But the 120 brings it to  
22 September 27th, right?

23 MS. MATTIACCI: Right, which is actually 150  
24 from today, right?

25 THE COURT: I thought that was 120.

1 MS. MATTIACCI: I'm sorry. Four months today.

2 THE COURT: Right. That's 120.

3 MS. MATTIACCI: Yeah, 120.

4 MR. HUGHES: Yes, Your Honor.

5 THE COURT: All right? So that gives you to  
6 the end of September and then the problem is is that  
7 once you begin, remember, we're down that Thanksgiving  
8 week in November for judicial college and from that  
9 time until the first of the year it's basically the  
10 Christmas holidays, people take a vacation. It just  
11 becomes very difficult to schedule anything lengthy.

12 If this were a two-day trial I could shoe  
13 horn it in. It's not a two-day trial, right?

14 MS. MATTIACCI: Can we do October? Is that  
15 possible?

16 THE COURT: I can give you an October date,  
17 but -- sure --

18 MR. HUGHES: Your Honor, that's going to be  
19 very problematic for MLB Network. That's right in the  
20 middle of the playoffs, the World Series and all of our  
21 witnesses are going to be directly involved in that.

22 THE COURT: Right. It's going to have to  
23 be that first Monday in January. I'm trying to give  
24 you -- it doesn't do you any good to give you a date  
25 that you'll be spending time giving off for only -- to

1 have one side say look, I'm not really ready and part  
2 of the problem is that plaintiff served these two  
3 reports on the last possible day which puts them in a  
4 stronger position than you. Do you follow?

5 MS. MATTIACCI: I understand that. I'm just  
6 saying we are -- we can be ready as quickly as Your  
7 Honor I know you want to get these cases going and  
8 moving so any time you want to give us an October a  
9 November -- I don't see -- this is not going to be a  
10 month-long trial. It's going to be maybe five days of  
11 testimony at the most; maybe not even that much. I  
12 mean --

13 THE COURT: Actually, I can move a month --  
14 I can get it -- I really don't have a sense of how long  
15 it's going to be now, but I can give you a late  
16 November date. But here is the thing. My last date in  
17 the building is probably going to be December 16th.  
18 You follow?

19 MS. MATTIACCI: Okay.

20 THE COURT: Which means if I give you --  
21 we're back from judicial college it looks like probably  
22 Thanksgiving this year is probably the 23rd, right?

23 MR. HUGHES: The 24th, Your Honor.

24 THE COURT: Oh, the 24th? Oh, I'm looking  
25 at 2017.

1 THE CLERK: Let me show you. Go back a  
2 little more, it should be November.

3 THE COURT: The 24th. So I can give you the  
4 28th.

5 MS. MATTIACCI: That would be wonderful, Your  
6 Honor.

7 THE COURT: Anybody have a problem with the  
8 28th?

9 MR. KELLEY: Well, you know, my only  
10 objection is that all of the motions in limine and all  
11 of that, those deadlines go back and so the week of  
12 Thanksgiving will be adjudicating all those motions.

13 THE COURT: No, it won't. In regard to --  
14 here is the thing. You can assume in regard to motions  
15 in limine that I will resolve all motions in limine  
16 that I resolve will before jury selection. If I get --  
17 if the 28th is the date -- let me see the calendar  
18 again.

19 All right. That gives you the 28th until  
20 December 2nd is one week, December 9th is -- that gives  
21 you three weeks. Assuming we need two or three days to  
22 finish the motions in limine and two or three days to  
23 pick a jury, that probably gives you about seven or  
24 eight trial days.

25 If it looks like it's not going to fit, I'm

1 not going to take any chances, my nightmare scenario is  
2 is that I start a case that I can't finish because of  
3 the holidays. You follow?

4 MS. MATTIACCI: Honestly, I think, Your Honor,  
5 I think we start on Monday we're done on Thursday. I  
6 mean, I don't see this being a --

7 THE COURT: If you're right then I have no  
8 problem with doing it. But if it looks like plausibly  
9 it's going to be more extensive than that then, you  
10 know, it may have to be kicked off till January.

11 But I'll give you that date for now. We'll  
12 see how it works with way. I don't have any problem  
13 with that. All right. November 28th. Yeah. All  
14 right.

15 By the way, what I'm going to -- we're going  
16 to take a break fairly soon so I can give you orders  
17 that so that orders can be prepared memorializing my  
18 rulings. What I don't want is to get orders under the  
19 five-day rule and then objections under the five-day  
20 rule.

21 All right. So does the plaintiff -- to go  
22 back to the beaning issue, what other arguments do you  
23 have that would show that Burke must have known that  
24 the allegation was false?

25 MS. MATTIACCI: Okay, Your Honor. Can we play

1 for you --

2 THE COURT: Yes.

3 MS. MATTIACCI: -- the --

4 THE COURT: Do you have it set up?

5 MS. MATTIACCI: Yes. It's set up.

6 THE COURT: All right.

7 MS. MATTIACCI: It's ready to go. This is the  
8 entire break between the top and the bottom of the  
9 fifth inning. This is what Mr. Burke looked at before  
10 he cropped and edited it. And before we play it, bear  
11 in mind this is the statement that he has, this is the  
12 only statement, "He also called his pitcher and catcher  
13 to the side before the bottom of the fifth inning and  
14 told his pitcher to hit him with the pitch, the first  
15 pitch. I heard him and my pitcher heard him and told  
16 the ump. The first pitch hit him in the ribs," and  
17 then this is what he actually looked at where you will  
18 see number one he never calls his pitcher and catcher  
19 over to the edge, to the side. There is no -- you  
20 will not see in here anybody indicating that they heard  
21 Mr. Williams order a bean ball ever and just so that --  
22 does Your Honor mind if I step over here --

23 THE COURT: Yeah, but that's not -- nobody  
24 is asserting that. I mean, there is nothing on any  
25 evidence where a judge or a jury can see on a video all

1 we hear anybody ordering a bean ball.  
2

3 MS. MATTIACCI: Right. And in fact, the  
4 evidence on this video contradicts that that happened  
5 because if that happened, there would be some reaction  
by somebody --

6 THE COURT: All right.

7 MS. MATTIACCI: But here is this person in the  
8 blue shirt, it's the coach of the opposite team, of the  
9 other team. Mr. Williams is going to come out in his  
10 red shirt talking to his son who is the catcher and  
11 then you're going to see in this wide angle which is  
12 different from what you were just shown, what you were  
13 just shown was that real short clip.

14 THE COURT: Excuse me. Just one second.

15 What's up? I'm sorry. Go ahead.

16 MS. MATTIACCI: Okay.

17 (Videotape is played.)

18 MS. MATTIACCI: So here is the coach of the  
19 other team, there is Mr. Williams. The umpire is  
20 standing right there. And he wrote that players and  
21 coaches overheard Mr. Williams order the bean ball  
22 based upon that.

23 MR. WARDEN: Keep going?

24 MS. MATTIACCI: Keep going, yes. Because now  
25 all this time goes by. Apparently a kid, Mr. Williams

1 just ordered the intentional kid of a ten-year-old with  
2 a ball and that is his how -- this is what happens, the  
3 other coach sits down next to him and is just sitting  
4 there --

5 THE COURT: Why would the other coach have  
6 overheard it?

7 MS. MATTIACCI: It didn't happen.

8 THE COURT: The point -- but I don't know  
9 what I just saw disputes that Williams whispered to his  
10 -- you're saying the catcher is his son?

11 MS. MATTIACCI: The catcher is his son.

12 THE COURT: Yeah, you wouldn't expect  
13 somebody that's standing I don't know, 30 feet away  
14 give or take to necessarily overhear that.

15 MS. MATTIACCI: Exactly. The only source that  
16 Mr. Burke had to go off on said I heard him and my  
17 pitcher heard him and told the ump. It doesn't -- it's  
18 never there.

19 THE COURT: I get your point.

20 MS. MATTIACCI: It's not there. So then he  
21 was like, this is what Mr. Burke, we're talking about  
22 Mr. Burke, he has this statement, he sees the full  
23 video. It doesn't happen. So then he crops it down so  
24 you can't see the sidelines, he cuts it to just where  
25 Mr. Williams talks to the catcher and he then he

1 doesn't publish --

2 THE COURT: Explain to me the cutting part.

3 MS. MATTIACCI: Yes.

4 THE COURT: What was cut out that was  
5 exculpatory?

6 MS. MATTIACCI: He --

7 MR. HUGHES: Mr. Burke simply zoomed in,  
8 Your Honor.

9 MS. MATTIACCI: The whole beginning of it. The  
10 whole beginning. The beginning when Mr. -- when the  
11 coach is over here, you don't see the coach standing  
12 like right next to Mr. Williams when this apparent  
13 ordering happens. He cuts that out and then he crops  
14 it down so you can't see the sidelines and then he does  
15 not publish what six says. He doesn't publish what his  
16 only source says happened.

17 THE COURT: Well, before we get to that, I'm  
18 focusing on the video.

19 MS. MATTIACCI: Yeah.

20 THE COURT: Frankly, the inference is that  
21 the video was reduced just because it may have been too  
22 long to expect viewers or listeners to play the whole  
23 thing. What exculpatory was cut out?

24 You say the distance between the coach and  
25 Mr. Williams was cut out?

1 MS. MATTIACCI: Yes. Well, because if he  
2 published a truthful article, it would be what his  
3 source said and if he published what his source said  
4 and played the expanded video --

5 THE COURT: Yeah.

6 MS. MATTIACCI: -- it does not -- it doesn't  
7 match. It doesn't show that. So instead, he crops it  
8 so that you don't see -- you don't see any -- he makes  
9 it seem like somebody could have overheard this when  
10 they crop it.

11 When you crop it down, when we watched that  
12 first video, you don't see the scope of look how much  
13 space is on the other end of the sidelines, how far  
14 back.

15 THE COURT: Well, you're going to have to  
16 play the -- the earlier version from today back so --  
17 play again to me one last time what you say was cropped  
18 out. Let's start from the beginning and I want you to  
19 tell me what was cropped out.

20 MS. MATTIACCI: If this video?

21 THE COURT: Yeah.

22 MS. MATTIACCI: Yeah, okay. So if we go back  
23 to the beginning.

24 (Video is played.)

25 MS. MATTIACCI: So in what Mr. Burke decided

1 to do, you don't see any of this on Mr. Burke's  
2 version. You don't see any of that coach walking over.

3 THE COURT: How does this help Mr. Williams?  
4 How does seeing this --

5 MS. MATTIACCI: Because now they just crop it  
6 right here.

7 THE COURT: Right.

8 MS. MATTIACCI: And they say oh, all of these  
9 witnesses heard Mr. Williams order this bean ball. But  
10 when you look at it it's a visual --

11 THE COURT: Stop it for one second.

12 (Videotape is stopped.)

13 MR. BOWMAN: I mean, what this actually shows  
14 --

15 THE COURT: No, I don't want to -- your  
16 argument is is that the redacted video that Burke put  
17 on the website allows for a stronger inference that  
18 there were witnesses to Williams allegedly telling his  
19 son to tell the pitcher to strike the opposing batter?

20 MS. MATTIACCI: It allowed him to make a new  
21 story, a story that no source had told him.

22 THE COURT: Yeah, but I'm still trying to --

23 MS. MATTIACCI: The new story is that --

24 THE COURT: I understand -- from what I  
25 recall when Mr. Williams is speaking to his son, there

1 wasn't anybody, there wasn't any third person within  
2 what I'll call whispering distance. Anybody want to  
3 disagree with --

4 MS. MATTIACCI: Not according -- yes, their  
5 only source says I heard him --

6 THE COURT: Well, I'll get to what the  
7 source says. I'm looking at what the video depicts.

8 MS. MATTIACCI: Right. The video doesn't  
9 depict what the source said.

10 THE COURT: I'll get to that.

11 MS. MATTIACCI: Okay

12 THE COURT: You agree that in neither the  
13 redacted version or this version is there a third human  
14 being within a whispering distance of Mr. Williams and  
15 Mr. Williams' son.

16 MS. MATTIACCI: Oh, no. You can see on the  
17 video that the umpire is like within ten feet and the  
18 coach is behind -- right behind him when the -- if you  
19 play it. Why don't we play it again so you can see it?

20 THE COURT: Play it again.

21 MS. MATTIACCI: You can see that the coach and  
22 the umpire are close by. The coach his even closer.  
23 The coach is closer.

24 (Videotape is played.)

25 THE COURT: Now, let's freeze it at that

1 point.

2 (Videotape is stopped.)

3 THE COURT: All right. It looks like we got  
4 -- it may be freezing early, but at the time that Mr.  
5 Williams begins to first talk to his son, we've got one  
6 guy -- that's the home plate umpire to the right?

7 MS. MATTIACCI: Home plate umpire, yes.

8 THE COURT: He looks like he's about I don't  
9 know five feet, ten feet max to the ten-year-old and  
10 Mr. Williams and you got somebody to the left. Who is  
11 that?

12 MS. MATTIACCI: That's the coach of the other  
13 team.

14 THE COURT: He's a little bit further. It  
15 looks like he's about 10 feet, 12 feet, something like  
16 that. Anybody want to disagree with those distances?

17 MR. BOWMAN: He's walking away. I mean, in  
18 this freeze-frame he's probably that far away, but he  
19 passed much closer and that was swoon both in the clip  
20 version and in this version.

21 THE COURT: All right. Let's continue.

22 (Videotape is played.)

23 THE COURT: All right. So the coach walks  
24 away and the umpire or a few seconds longer remained in  
25 the vicinity and then everybody broke up. All right.

1 Now let's play the redacted version. Let me see if  
2 there is anything material missing in the redacted  
3 version.

4 (Videotape is stopped.)

5 MR. BOWMAN: Why don't you let that -- I  
6 mean, at some point you should let that role and see  
7 all the reactions after they hit batter.

8 (Videotape is played.)

9 THE COURT: Actually, the redacted version  
10 looks a lot clearer. Let's stop it there for a second.

11 (Videotape is stopped.)

12 THE COURT: Why does this look clearer to me  
13 visually? Am I the only person that thinks it a little  
14 bit clearer? Am I seeing things? I don't know.

15 MS. MATTIACCI: It's cropped in. It's cropped  
16 I so you can't see the --

17 MR. BOWMAN: Mr. Burke was posting it on  
18 website so one of the things Mr. Burke does and he  
19 talks about it in his certification is he creates video  
20 clips. He thought this was the most relevant portion  
21 as he says in his certification and he clipped a piece  
22 of that when he was describing what the witness told  
23 them, he put the piece in so the people reading the  
24 story could see for themselves what the witnesses were  
25 saying.

1 THE COURT: Ms. Mattiacci, the clip version  
2 we go to Mr. Williams coming out and talking to his son  
3 without the minute or two of the people milling around  
4 a bit. But I still don't understand what it is that  
5 was taken out that you think deliberately evidence is  
6 an attempt to contort a story?

7 MS. MATTIACCI: Because he made up a story.  
8 The story that he wrote is not a story from any source.

9 THE COURT: Yeah, but what did he take out?  
10 Here is the thing. If three guys rob a bank and  
11 they're all on video and one of the guys wants to try  
12 to produce an exculpatory tape he would try to get the  
13 video and excise himself out of the video and you would  
14 say, okay, we know what he's trying to do. Three guys  
15 robbed a bank, the video depicts two guys, where is the  
16 third guy? I could understand why somebody would edit  
17 a tape to take themselves out.

18 Here I don't understand what was taken out  
19 that destroys the -- and remember, the Courts don't  
20 look at these stories with a fine tooth comb. We  
21 basically say whether or not the larger story from the  
22 picture essentially is -- I won't say true, because  
23 that's not the standard, essentially is so obviously  
24 false that the person responsible for his publication  
25 had to have known it was false.

1 And frankly, I'm trying to understand what  
2 the redaction of the tape and I still don't get what it  
3 is that was taken out that is so helpful in showing  
4 that Source Number 6's allegation must have been false.

5 MS. MATTIACCI: Okay. Well, it's two separate  
6 things. Source 6's allegation is false because none of  
7 it is in the video. It's not on -- what Source says is  
8 not on the video.

9 THE COURT: I understand the part about  
10 Source 6 says that Williams speaks to pitcher and  
11 catcher and this only depicts Williams speaking to  
12 catcher, right?

13 MS. MATTIACCI: Correct.

14 THE COURT: But that's in the -- that's the  
15 redacted version and the short version and the long  
16 version.

17 MS. MATTIACCI: So I think what the short  
18 version does is in the article he says that multiple  
19 people -- that people overheard this that heard him say  
20 this and when you're in that cropped version you think  
21 oh, there must be people like really close by that must  
22 of heard this.

23 And then when you watch the real, the  
24 unedited, that's why you realize no, nobody could have  
25 heard this. That's ridiculous.

1 THE COURT: I think that's a stretch. I  
2 think I have a better grasp. I don't think the editing  
3 out of what was edited out was for the purpose of  
4 somehow showing that others couldn't have heard. They  
5 both clearly -- both the edited and unedited basically  
6 only show that the only two people that might have  
7 reasonably overheard unless Mr. Williams is screaming  
8 at the top of his lungs to do something are the home  
9 plate manager and very briefly the other coach --

10 MS. MATTIACCI: But that's a secondary  
11 argument. The first argument is that the only source  
12 he has and what the source says happened does not  
13 appear on any of the video. So the reason he cropped  
14 it --

15 THE COURT: He also called his pitcher --  
16 all right. You're saying Source 6 could not have been  
17 in the video.

18 MS. MATTIACCI: What Source 6 relayed does  
19 not appear on the video. Source 6 is his only source -  
20 -

21 THE COURT: All right. Source 6 is he  
22 walked by our catchers so that implies Source 6 is a  
23 member of the opposing team, not probably a ten-year-  
24 old kid but probably a coach, a manager? Is that the  
25 proper terminology? A manager, right?

1 MS. MATTIACCI: Right.

2 THE COURT: Right. He's an adult. All  
3 right?

4 MS. MATTIACCI: Uh-huh.

5 THE COURT: All right. A couple of our kids  
6 heard him, one kid asked his parents on his way home  
7 why he would call our pitcher a name and asked what it  
8 meant. He also called his pitcher and catcher to the  
9 side before the bottom of the fifth and told his  
10 pitcher to hit him with the first pitch. I think the  
11 last thing I heard in -- and the last thing, I heard  
12 him and I heard him and -- why is that blocked out?

13 MR. BOWMAN: Your Honor, because that would  
14 identify the source.

15 THE COURT: I'm trying to understand the  
16 sentence. I heard him and blank pitcher heard him and  
17 blank told the ump. There was somebody's name there or  
18 something?

19 MR. BOWMAN: Yes, Your Honor. Or a pronoun.

20 THE COURT: All right. All right. Could  
21 this have been accurate?

22 MR. BOWMAN: Yes, Your Honor.

23 THE COURT: How is that? Williams didn't  
24 speak to the pitcher, he spoke to the catcher.

25 MR. BOWMAN: The pitcher is the batter and he

1 said I heard him and the sources saying --  
2

3 THE COURT: Well, the pitcher is the --  
4

5 MR. BOWMAN: -- the pitcher heard him, that's  
6 the batter.  
7

8 THE COURT: The pitcher is not Williams'  
9 pitcher, the pitcher is the opposing team's pitcher at  
10 bat.  
11

12 MR. BOWMAN: Right. The opposing team's  
13 pitcher at bat. Yes, Your Honor.  
14

15 THE COURT: All right.  
16

17 MS. MATTIACCI: That's the second part of it;  
18 no, not the first. What Your Honor was talking about  
19 he called his pitcher and catcher to the side. He  
20 means Mitch Williams' pitcher and Mitch Williams'  
21 catcher. His refers to Mr. Williams and that is not  
22 true.  
23

24 MR. BOWMAN: That's subsidiary. It's  
25 shorthand for talking to the catcher and the the  
pitcher. You know, that's subsidiary to the overall  
meaning of what three sources told Mr. Burke. I just -  
- two things for the record, Your Honor.  
26

27 This -- I know we've referred to this as a  
28 redaction. This is a cropping. This is zooming in.  
29 This isn't cutting something out. And also, you know,  
30 the issue here is whether there's clear and convincing

1 evidence that Burke fabricated something. This isn't  
2 even --  
3

4 THE COURT: I understand. Just anybody  
5 wonder, you know, a court is spending hours upon hours  
6 dissecting evidence that, you know, maybe Burke spent  
7 six seconds on. I don't have the famous idea, but I  
8 don't know any way you want. If this goes appeal, the  
9 Appellate Division might spend three weeks dissecting  
all this stuff who knows.  
10

11 MR. BOWMAN: Fair point, Your Honor. My only  
12 point was that this is evidence of what happened not  
13 evidence any sort of evidence about what Burke thought.  
14 Mr. Burke was deposed --  
15

16 THE COURT: Right.  
17

18 MR. BOWMAN: Mr. Burke produced his  
19 documents.  
20

21 THE COURT: All right. Let me get to the  
22 bottom line. What else would you want to tell me or  
23 argue to me about the video?  
24

25 MS. MATTIACCI: Well, that says I heard him  
and my pitcher heard him and told the ump. It does not  
-- this video does not in any way show that anybody  
would have heard him and the pitcher heard him and --  
26

27 THE COURT: That's a fair point that the  
28 pitcher is hard to know because if the pitcher is the  
29

1 batter, where is he in all of this?  
2

3 MR. BOWMAN: To the right of the --  
4

5 THE COURT: I mean, the kid --  
6

7 MR. BOWMAN: Why don't play it?  
8

9 MS. MATTIACCI: Yeah.  
10

11 (Videotape is played.)  
12

13 THE COURT: It's that kid, obviously, to the  
14 right, right? He's in the -- he's kind of --  
15

16 MR. BOWMAN: Yeah.  
17

18 THE COURT: All right. I get it. All  
19 right.  
20

21 (Videotape is stopped.)  
22

23 MS. MATTIACCI: And then nobody tells the ump.  
24 The ump testified nobody said anything about a kid  
25 getting hit beforehand or warning him and then in the  
article that Mr. Burke publishes he says that the ump  
was warned ahead of time and that the ump warned both  
benches before the pitch was thrown. The video doesn't  
show that at all, he published it anyway.

26 THE COURT: All right. Mr. Bowman?  
27

28 MR. BOWMAN: I think the testimony shows that  
29 it was the base coach umpire who was warned. But  
30 again, you know, Mr. Burke had sources telling him this  
31 incident occurred and we can nitpick about whether or  
32 not it was the catcher then told the pitcher, or the  
33

1 pitcher and the catcher at the same time, but those are  
2 all subsidiary to the point of this video that Mr.  
3 Burke was looking at and wrote about in his  
4 certification and testified about.

5 He was looking to see whether there was  
6 anything here that contradicted the gist of what he had  
7 been told that there was an order to hit the batter.  
8 Mr. Burke testified that there wasn't and even if one  
9 accepts the proposition that he missed something,  
10 that's not actual malice.

11 But I don't think he did here; at most this  
12 is ambiguous.

13 THE COURT: All right. Ms. Mattiacci, I'm  
14 inclined to agree. This is a fairly close case and  
15 it's not exactly exemplary reporting because it's a  
16 very serious allegation to allege that an adult, a  
17 former Major League baseball player is ordering a ten-  
18 year-old kid to bean. Was that the word that was used  
19 earlier?

20 MS. MATTIACCI: Bean ball, yes, Your Honor.  
21

22 THE COURT: To bean. I mean, that could  
23 potentially kill another kid and you're correct that  
24 even the best source so to speak, Source 6, doesn't  
25 allege a bean. He says he hit him with the first  
pitch.

1                   But I'm supposed to look at things not  
2 begrudgingly and with a fine tooth comb and the essence  
3 is is that there are sources that appear to be  
4 multiple. One is stronger than the other that allege  
5 that there was a specific instruction to hit the  
6 opposing batter with the pitch.

7                   MS. MATTIACCI: Your Honor, but that -- the  
8 standard is whether there are interary consistencies,  
9 contradictions, failure to pursue the most obvious  
10 available sources of a corroborating evidence.

11                  There was a contradictory email that was sent  
12 to Mr. Burke that said that what was published is not  
13 true.

14                  THE COURT: Well, that's what I thought I  
15 meant to ask you --

16                  MS. MATTIACCI: Yeah.

17                  THE COURT: -- what did you have to  
18 contradict it? You've indicated the video. You've  
19 indicated -- I didn't mean to cut you off if you have  
20 something, what else do you have?

21                  MS. MATTIACCI: Yeah. So there was an email  
22 that was sent by Laura Redmond.

23                  THE COURT: Before publication.

24                  MS. MATTIACCI: Before publication.

25                  THE COURT: Where is that in all of this? I

1                  think in our exhibit it was AA.

2                  THE COURT: AA? I don't see any AAs.

3                  MS. MATTIACCI: It's to our motion, I know  
4 that the --

5                  MR. BOWMAN: Your Honor, it's exhibit -- the  
6 first certification we're looking at it's Exhibit J,  
7 Your Honor.

8                  THE COURT: All right.

9                  MR. BOWMAN: It's Gawker 0058 is the date  
10 stamp on that email.

11                  THE COURT: All right.

12                  MR. BOWMAN: And before we leave the bean  
13 ball, do you want to hear argument on the law or do you  
14 just want to focus on the facts?

15                  THE COURT: No. No. I know what the law  
16 is. This is the email that says when you were going up  
17 post -- when are you going up -- when are you going up  
18 post some factual -- is that what you're referring to?

19                  MS. MATTIACCI: Yes, Your Honor.

20                  THE COURT: All right. "When are you going  
21 up? Post some factual rebuttal regarding this, many of  
22 us have been trying to set the record straight. Nobody  
23 wants to hear it because it's not good for you to have  
24 to correct yourself. Have some class and respond to  
25 the parents of our team. Mitch Williams is far from

1 the person you let that parent from the other side  
2 describe. He is the most caring coach to those boys  
3 and trains them well. They display exceptional  
4 sportsmanship even in the toughest of moments such as  
5 this you have disgraced 12 10-year-old boys for the  
6 pleasure of trying to destroy a man's career and  
7 reputation. The incident was both instigated by and  
8 prolonged by the umpire. The picture you posted was  
9 from a parent on the other team who was shown the most  
10 distasteful and personal form of revenge for losing a  
11 baseball game. He did notice that the reports came out  
12 after we came back the next day to beat this team in  
13 the semi-final game? As to our side or are you  
14 interested in the truth?" It's signed by a Laura  
15 Romond, R-O-M-O-N-D?

16 MS. MATTIACCI: Yes.

17 THE COURT: What is this addressing the  
18 specific issue of alleged to have beaned another kid?

19 MS. MATTIACCI: Well, Mr. Burke could have  
20 reached out to her. She's an obvious source that would  
21 have corroborated or contradicted what was being  
22 alleged and he never did. He never even called Mr.  
23 Williams to get his comment. He never called either of  
24 the umpires to find out. The umpire is the one closest  
25 sitting there.

1 He -- he publishes that the whole umpire he  
2 writes in the article, "The home umpire who had been  
3 made aware of the upcoming bean ball warned both  
4 benches." It's not in the video. That's --

5 THE COURT: That's a fair point. But this  
6 person from what I recall of the tape, there are only  
7 four potential people who might have reasonably  
8 overheard something that Mr. Williams' son, the home  
9 plate umpire and the coach from the other side who was  
10 in 10 feet away give or take for a second or two.

11 Laura -- who would Laura Redmond know based  
12 on -- at least based upon firsthand knowledge whether  
13 or not there was some type of nefarious communication  
14 between Williams and his son before that pitch?

15 MS. MATTIACCI: The point is is that it was  
16 somebody else that he could have --

17 THE COURT: I understand that but this is  
18 not a tape of the Kennedy assassination, it doesn't  
19 require that the full-fledged investigation of this  
20 very potential witness before something is published  
21 only in the context of a public figure that the person  
22 publishing the story not know that it was false.

23 Was the home plate umpire ever spoken to  
24 about what he had seen?

25 MS. MATTIACCI: No.

1 MR. BOWMAN: Two corrections. The home plate  
2 umpire was deposed. The --

3 MR. BOWMAN: Mr. Williams -- Mr. Burke didn't  
4 know the identity of the umpires in his certification  
5 and in the record he tried calling Ripken Baseball and  
6 they didn't call him back.

7 It's also -- I want to correct the statement  
8 here about he didn't respond to this email. His  
9 testimony is unrebutted testimony is he doesn't  
10 remember seeing this email. I came in -- he has  
11 Tuesdays and Wednesdays off because he works all  
12 weekend because he covers sports, he doesn't remember  
13 receiving this email. He didn't choose not to contact  
14 this person.

15 MS. MATTIACCI: The home plate umpire was  
16 deposed and testified it's false. I mean, what was  
17 published was false. He was never --

18 THE COURT: Yeah, but was this done before  
19 publication?

20 MS. MATTIACCI: No, that's why I'm saying he  
21 was never contacted.

22 THE COURT: All right.

23 MS. MATTIACCI: So he was never contacted --

24 THE COURT: We're still stuck in the same  
25 place. What other evidence do you want me to consider

1 that contradicted Source 6's allegations?

2 MS. MATTIACCI: Well, you would agree with me,  
3 Your Honor, that that -- what he wrote here about what  
4 the umpire did is contradicted by the video.

5 THE COURT: It does not appear to be  
6 consistent.

7 MS. MATTIACCI: Right. The article writes  
8 that the player was hit square in the ribs,  
9 contradicted by the video.

10 THE COURT: Yeah, but it's hard to tell and  
11 I think those are minor points from what I saw it  
12 looked like the pitch was a wayward pitch. I couldn't  
13 tell you what part of the body. If you want we could  
14 play it again and I could describe what it looks like.  
15 But remember, the law doesn't require that these  
16 articles give every single fact a hundred percent  
17 correct.

18 The defamatory aspect of this is that an  
19 adult told a child to hit another child with a  
20 baseball. I agree with you to some extent that beaning  
21 as I guess it's commonly known is worse than throwing a  
22 baseball at the body but only marginally worse, a  
23 baseball thrown at somebody's body may be even by a  
24 ten-year-old can cause some serious injury.

25 MS. MATTIACCI: Right. I mean, it's -- what

1 he reported as Mr. Williams ordering the assault of a  
2 ten year old is contradicted by the video itself.  
3

4 THE COURT: I don't see it as being  
5 contradicted. I see the video neither corroborating  
6 nor contradicting the allegation. I mean in essence  
7 you have Mr. Williams speaking to his son and only Mr.  
8 Williams and his son know for sure what was said in  
9 that particular moment. I don't regard the video as  
10 either contradicting that allegation or corroborating  
11 the allegation. It's not like you can see Mr. Williams  
12 pantomiming with a baseball and pointing to the head of  
13 the other kid and saying see this baseball and I want -  
- nothing like that.

14 MS. MATTIACCI: Your Honor, but he had the  
15 video and he has one source and they don't match. So  
16 he changed the story. The story he printed is not the  
17 same story of the source.

18 It's equivalent -- what if there was a  
19 Supreme Court justice --

20 THE COURT: Right.

21 MS. MATTIACCI: Who was -- it was published  
22 that -- let's just say that somebody Facebooked Gawker  
23 or another publication and said I saw a Supreme Court  
24 Justice walk into a hotel room with a prostitute and I  
25 have a video of it? And well, it's a public figure,

1 we're going to publish it.  
2

3 THE COURT: Well, and use an analogy and  
4 suppose a video shows the justice going in with a young  
5 woman, right? You don't know from looking at that  
6 video was that his wife, was that his daughter is that  
7 his next door neighbor or is that a prostitute? The  
8 video -- but looking at the video wouldn't either  
9 corroborate or contradict the allegation.

10 MS. MATTIACCI: Here is the difference.

11 THE COURT: Right.

12 MS. MATTIACCI: It's the -- it would be the  
13 equivalent of a source saying I have a video of the  
14 justice going into a hotel room on Route 130 with a  
woman.

15 THE COURT: Right.

16 MS. MATTIACCI: And here is the video and then  
17 you go look at the video and it's the justice walking  
18 into the Lowes in Philadelphia and a woman is in the  
19 vicinity and walking in.

20 Well, that's -- no, the source said that they  
21 personally -- because this is I heard, I heard --

22 THE COURT: But let's make it -- let's use  
23 that -- as it's getting close to closing time,  
24 something to think about in fact to bring it all back.  
25 Let's take away from this. Let's use what we just

1 proposed used, three separate people communicate with  
2 the news media and said I know that Justice X is  
3 patronizing a prostitute at a hotel on Route 130. All  
4 right? And there is a video that shows the justice  
5 walking with the young woman into a motel, but it's not  
6 on Route 130. Let's make it on Route 30, whatever, all  
7 right?

8 And the news media publishes the allegation,  
9 all right? What's the result?

10 MS. MATTIACCI: Well, it's --

11 THE COURT: Supposing the (indiscernible)  
12 standard applies because it's an article about a public  
13 figure, a judge, so there's no question the actual  
14 malice standard applies.

15 MS. MATTIACCI: But there's more facts because  
16 the fact is is that if that -- it would be the  
17 equivalent of that author publishing it with the source  
18 saying I saw him walk into that hotel on Route 30 or on  
19 -- you know, so it would be completely different. It's  
20 like I saw him walk into a hotel at the Lowes.

21 THE COURT: Well suppose on of the three  
22 sources say -- two of the three sources say that it  
23 happened, but they don't indicate the basis of their  
24 allegation. One of the three sources says I know it  
25 happened because I saw him walk in with somebody that

1 was a known prostitute, you know, February 3rd or  
2 whatever it was.

3 MS. MATTIACCI: Uh-huh.

4 THE COURT: All right? And suppose further  
5 that the news media outlet does no further  
6 investigation, they just run the story? What's the  
7 result?

8 MS. MATTIACCI: You can't do that because --  
9 well, let me say this. What this reporter had access  
10 to was more information than what you have there  
11 because it would be the equivalent of that person  
12 saying I was there and I was standing next to him when  
13 he walked into the hotel and then we get the security  
14 tape of the whole hotel lobby and everybody is coming  
15 in and out and there's nobody else in this vicinity.

16 So that person who said I was there and I saw  
17 the person go in, wasn't on the tape. So therefore, if  
18 the person goes and publishes --

19 THE COURT: But that's a more blaring case.  
20 If it's one source, it's an easier case if you say  
21 this. If one source calls and says I saw the  
22 justice go into the Merry Times Motel on Route 130 on  
23 February 4th at ten o'clock and the reason why I know  
24 it was that date and time is that's my own anniversary  
25 and blah, blah, blah, blah, and the news media outlet

1 doesn't go with the story, they then contact the motel  
2 and they find out that the motel had closed six months  
3 earlier, all right? That's a much tougher case --

4 MS. MATTIACCI: Uh-huh.

5 THE COURT: But I don't regard that as being  
6 this case. The video that we've gone over time and  
7 time again I regard as being inconclusive either way.  
8 I regard don't regard it as being particularly helpful  
9 or hurtful to either side. So what we're kind of stuck  
10 with is three people that report it, one of which is a  
11 stronger reporting because it appears to be non-  
12 hearsay, and you also -- and we really haven't  
13 discussed this and we need to discuss it and we need to  
14 break in a few seconds, but Mr. Williams apparently  
15 indicated that he had not ordered a bean ball, but that  
16 he had told the pitcher, the pitching side. This is  
17 what the Gawker is alleging.

18 Which frankly, somewhat corroborates the  
19 allegation. Telling a ten-year-old to pitch another --  
20 another ten-year-old to pitch inside sounds like it can  
21 be dangerously close to hitting the other player.

22 MS. MATTIACCI: Yeah, just that, Your Honor  
23 pitching inside is perfectly legal. It's a strategy in  
24 baseball.

25 THE COURT: Yeah, but here's the problem.

1 I'm not a baseball player. I mean, we'll have to  
2 address that and perhaps there is something that each  
3 side needs to investigate a little bit further. I know  
4 a little bit about baseball, it wasn't as though I was  
5 raised in a monastery, but my understanding of telling  
6 somebody to pitch inside, is the ball gets closer to  
7 the person or the batter, no?

8 MS. MATTIACCI: There's a home plate you  
9 either pitch it straight down the middle, you pitch it  
10 outside, you pitch it inside. They're all strikes.  
11 We're not even talking about balls. So he's saying  
12 pitch inside, go on the inside corner because that way  
13 the kid would pull it -- I mean, Mr. Williams went into  
14 deposition testimony about this but where the kid  
15 usually puts his hands on the plate, he would pull it  
16 inside and hit a foul ball because he's a good pitcher.  
17 That's why he -- and there is nothing -- I mean, they  
18 had pitchers that were throwing curve balls.

19 So we're not talking this was nothing  
20 nefarious in any way.

21 THE COURT: The record should reflect my own  
22 limitations is that I am not an expert on baseball and  
23 you may be right, but the impression I got from the  
24 commendation to pitch inside was not as benign as yours  
25 and the impression I got and I want to perfectly

1 transparent was of brushing the batter back so to  
2 speak.

3 MS. MATTIACCI: Well, that's why the jury has  
4 to hear this case because you're just hearing the spin  
5 of how they're putting it on.

6 MR. BOWMAN: Your Honor --

7 THE COURT: It's not such much a spin as  
8 that there 400 trial judges in New Jersey and we all  
9 have different life experiences. Today I'm handling a  
10 baseball case. I'm not an expert on baseball.  
11 Tomorrow it will be a medical malpractice case as to  
12 whether or not a particular valve was used in the right  
13 context in an aortic valve replacement. I'm not a  
14 cardiac surgeon either and the next day after that  
15 somebody is going to be alleging something that  
16 involves some esoteric terminology and some contract  
17 involving the sale of beer.

18 The record should reflect that I'm doing the  
19 best I can with issues concerning literally baseball  
20 and appropriate behavior and some of this stuff frankly  
21 is not stuff that I deal with in my everyday life on a  
22 day-to-day basis.

23 I'm not trying to cut you off, Mr. Bowman?

24 MR. BOWMAN: I just have two quick points for  
25 the record. I mean, I think the question here isn't

1 what Mr. Williams thought an inside pitch is or what I  
2 think an inside pitch is or what Your Honor thinks an  
3 inside pitch it. It's how Mr. Burke understood that  
4 word. The other thing I want to say about your  
5 hypothetical, you know, I think with all due respect  
6 the answer is clear, the Lawrence case there was one  
7 source that told a reporter that a public official was  
8 under investigation for bribery. That as a matter of  
9 law was not actual malice because there was no evidence  
10 the reported doubted that one source.

11 Here you have three and there's likewise no  
12 evidence. There's some speculation of what the  
13 reporter should have thought, but the Supreme Court in  
14 this state has consistently said that what a reporter  
15 should have known, that's not relevant. What's  
16 relevant is what the reporter did know.

17 MS. MATTIACCI: And I may I end on Your Honor,  
18 that looking at Source 6, he or she says I heard him  
19 and my pitcher heard him, and the pitcher told the ump.  
20 It's not in the video. At no point shows that in any  
21 way that anybody heard that.

22 THE COURT: Yeah, I acknowledge that the  
23 video does not corroborate and to some extent I agree  
24 that it contradicts it, but the major points that there  
25 -- remember, to some extent there is some

1 corroboration. Mr. Williams did speak with the  
2 catcher. The catcher then speaks to the pitcher, the  
3 first pitch is very inside. It's not as though it's  
4 close. But it looks like it's directed -- the pitch is  
5 directed directly at the person of the batter.

6 Underlying all of that is the aware all of  
7 these briefs is that there is a lot of bad blood  
8 allegedly being alleged and bad behavior and other  
9 things which you can't take this in isolation. We  
10 haven't even gone to the allegations as to whether Mr.  
11 Williams called another player using the P word, you  
12 called somebody else using the F word, or did something  
13 else.

14 And we'll try and disentangle that sometime  
15 relatively soon, but none of this stuff should be taken  
16 in isolation if the law requires me to view these  
17 motions based upon the perspective of Mr. Burke and  
18 it's hard for me to determine based upon what's been  
19 presented that Burke had to have known that the  
20 allegation forgot about whether it was a bean pitch,  
21 the allegation that Mr. Williams instructed the catcher  
22 to instruct your son, to instruct the picture to hit  
23 the other team's pitcher who was at the plate.

24 None of the stuff you presented leads me to  
25 conclude that Mr. Burke had to have known that that was

1 a falsehood.

2 MS. MATTIACCI: Well, Your Honor, with all  
3 due respect, you're setting the bar higher than we have  
4 to prove.

5 THE COURT: We'll go into that. We'll go  
6 into that. I'm not ruling it on it at this point.  
7 We'll go into that. All right. Let's discuss  
8 scheduling. It's already five after.

9 Bebe, do you want to have Jeanette -- where  
10 is Matt? Matt, do you want to bring in my calendar,  
11 please? I'm going to have to let you all go before we  
12 get the orders on my previous rulings memorialized.  
13 I'm going to keep my fingers cross and impose upon each  
14 side if they want to send me an order, but to exchange  
15 them among yourselves to see if you can agree with  
16 something before you send it to me, thank you.

17 MR. BOWMAN: Uh-huh.

18 THE COURT: Any reason why I can't have you  
19 back some time next week?

20 MS. MATTIACCI: I have oral argument in  
21 Reading on Thursday, Your Honor.

22 THE COURT: How about Friday, June 3rd?

23 MR. BOWMAN: I have a personal conflict on  
24 Friday. Is there any chance we can do it on Thursday,  
25 Your Honor?

1 THE COURT: Ms. Mattiacci just indicated  
2 she has to --

3 MR. BOWMAN: I'm sorry. I'm sorry. I was  
4 looking at my calendar. How about Wednesday?

5 THE COURT: How about Wednesday?

6 MS. MATTIACCI: Wednesday is okay, Your Honor,  
7 for me.

8 THE COURT: All right. All right. I  
9 haven't heard any descents yet. All right. Nine  
10 o'clock. See if we can finish it up before lunch.

11 MS. MATTIACCI: Your Honor, is there anything  
12 that you want us to particularly focus on to prepare  
13 for argument on Wednesday?

14 THE COURT: I thought about that. I don't  
15 need the briefs about the law and type of stuff. If  
16 you want to send me another page on it, that's fine.  
17 But if you want to basically give me a cheat sheet  
18 concerning evidence that you -- in your case, evidence  
19 that has that contradicts what it is that Mr. Burke  
20 thought concerning the truthfulness of the allegations  
21 at the time of publication. Kind of what I've been  
22 doing up until now is taking each piece of evidence and  
23 trying to understand what the evidence was that would  
24 support Burke thinking what was true and then inviting  
25 the plaintiff to give me the evidence that must have

1 contradicted it in such a way that Burke most have  
2 known it as false, not that he may have doubted this  
3 sincerity of it, but that he actually would have  
4 transformed his belief into a belief that he's now  
5 publishing a false allegation.

6 If you want to do that, I'm open to it, but  
7 I'm not requiring anybody to do it.

8 MS. MATTIACCI: May I address that because I  
9 want to make sure I'm on the right field, so to speak.  
10 The -- we have to prove that he had a high degree of  
11 awareness of probable falsity or entertain serious  
12 doubt as to the truth of this statement.

13 THE COURT: Right.

14 MS. MATTIACCI: Not that he had to have known.

15 THE COURT: Right. That may have been a bit  
16 of an overstatement of a certainty but to use the  
17 language let's see -- I'll take from our Supreme Court  
18 in Durando versus Nutley Sun which is a relatively  
19 recent 2012 case although this is on page 252, although  
20 the actual malice standard is difficult to meet a  
21 plaintiff will satisfy the standard despite an editors  
22 position that they can show the story was fabricated by  
23 the defendant is the product of his imagination or is  
24 based on a wholly, on an uninvited, unverified  
25 unanimous telephone call. And likewise, the publisher

1 will not prevail when his allegations are so inherently  
2 importable that only reckless man would have been put  
3 them in circulation where there are obvious reasons to  
4 doubt the voracity of an information or the accuracy of  
5 his reports. And probably that last bit of language is  
6 the language that's most helpful to you.

7 MS. MATTIACCI: Yes.

8 THE COURT: So I still think it's an  
9 extremely high standard because remember attached to  
10 all of that is not just proof by a preponderance of the  
11 evidence, it's proof by clear and convincing evidence,  
12 so it's a very high standard.

13 MR. BOWMAN: Your Honor, may I just request  
14 that if something is submitted it be submitted by five  
15 o'clock on Tuesday and served on us by email so we also  
16 see it before the hearing?

17 THE COURT: Oh, sure. That should be no  
18 doubt about that. Everybody should get here at the  
19 same time. Anybody else have any questions or concerns  
20 We should ultimately finish this up on Wednesday and  
21 see where we are and if anybody wants to readdress any  
22 issues concerning trial dates or discovery end dates  
23 between there's a something you can be able to find out  
24 between now and Wednesday, no better way than to spend  
25 your Memorial Day weekend in contacting proposed

1 experts to see what they need an average time they'll  
2 need to refute something the other side has done, I'll  
3 be glad to address that also on Wednesday morning.  
4 Anybody have any further questions or concerns?

5 MR. BOWMAN: Thank you, Your Honor.

6 MS. MATTIACCI: No, Your Honor.

7 THE COURT: Have a good holiday. All right.

8 MR. HUGHES: Thank you, Your Honor.

9 THE COURT: All right.

10 \* \* \*

11 (Whereupon, proceedings of 5/27/2016 were concluded)

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C E R T I F I C A T I O N  
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5 I, Lauren Vollmin, the assigned transcriber, do hereby  
6 certify that the foregoing transcript of proceedings  
7 before the Camden County Superior Court on  
8 May 27, 2016, digitally Recorded, from Index  
9 Number 1:44:03 to 3:03:59; Index Number 3:18:22 to  
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17 BY: Lauren A. Vollmin \_\_\_\_\_ A.O.C. #469  
18 Lauren A. Vollmin  
19  
20 Dated: November 22, 2016  
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